Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

FRANK P. FACONTI,

Petitioner,

v.

JOHN E. POTTER,
Postmaster General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two disability discrimination cases before this Court are unique unto themselves, but in both cases, it has been declared that, "...the evidence is insufficient for a reasonable trier of fact to conclude that plaintiff was capable at the time of the challenged employment actions, of performing the essential functions of the post office positions in question." The lower court ruled anyone who is granted Civil Service Retirement System (CSRS) disability retirement cannot be considered a qualified individual with a disability and the United States Court of Appeals For the Second Circuit's decision rests on that basis. This decision contradicts the finding of the Equal Employment Opportunity Commission (EEOC), an EEO administrative judge and the published decision in the Federal Equal Opportunity Reporter, all of which declared me to be a qualified individual with a disability in a companion case still on hold before the United States District Court, Eastern District of New York (***Faconti v. Potter***, CV –01-2600).

1. Is not the finding of an administrative agency, such as the EEOC, in a companion case, ***Faconti v. USPS*** , Appeal No. 01950657, a basis for consideration in the determination in a disability discrimination case of the threshold question of whether an individual is considered a qualified individual with a disability within the meaning of the Rehabilitation Act of 1973?

2. If so, should not a finding that appellant was a qualified individual with a disability in his companion case by both the EEOC in ***Faconti v. USPS*** , Appeal No. 01950657, and in ***Faconti v. USPS***, EEOC #01976463 by an EEO administrative judge be sufficient basis to reasonably have precluded the United States Court of Appeals For the Second Circuit from issuing an unpublished opinion denying appellant's appeal on the grounds that "...the evidence is insufficient for a reasonable trier of fact to conclude that plaintiff was capable at the time of the challenged employment actions, of performing the essential functions of the post office positions in question."?

3. If not, why do the Rules of the Supreme Court of the United States, as stated in the '.pdf' file on the Supreme Court website, under Rule 14, section 1, subheading (i), (ii) indicate the following as being appropriate for the Content of a Petition for a Writ of Certiorari Appendix, "...any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases..."?

4. Cannot an applicant for Civil Service Retirement System (CSRS) disability retirement who is granted a disability retirement still be considered an otherwise qualified individual with a disability, within the meaning of the Rehabilitation Act of 1973, if the federal agency failed to exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counseled that employee to seek or supported the employee's request for

disability retirement (including the reviewing every vacant position)?

5. Is not a *pro se* litigant entitled to at least the same standard of justice in the consideration of an appeal as an individual represented by an attorney, if not the more, as in the liberal pleading standard applied to pro se plaintiffs under **Haines v. Kerner, 404 U.S. 519, 520 (1972)**?

6. As the non-moving party in a motion for summary judgment, should not the Eastern District Court of New York have viewed the evidence in the light most favorable to the plaintiff (now appellant), as required in ***United States v. Diebold, Inc.***, 369 U.S. 654, 655 (1962) and ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 255 (1986)?

7. If this Court decides favorably on the issue of appellant being a qualified individual with a disability, should not this Court also rule on the more complicated questions of jurisdiction, judicial estoppel and accommodation raised by both parties?

8. Finally, did the Eastern District Court of New York misapply the law from the recent major decision ***Cleveland v. Policy Mgmt. Sys., Inc.***, 526 U.S. 795 (1999) in its use of judicial estoppel in the granting of summary judgment to the defendant?

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OPINIONS AND JUDGMENTS BELOW

The denial of a Petition For Rehearing for Case 02-6318 dated December 4, 2003. This opinion is reprinted in the Appendix at page 1a.

The denial of a Petition For Rehearing for Case 02-6320 dated December 30, 2003. This opinion is reprinted in the Appendix at page 3a.

The denials of the Petitions For Rehearing are from an unreported opinion of the United States Court of Appeals For the Second Circuit dated October 9, 2003 affirming the decision of the United States District Court Eastern District of New York granting summary judgment to Defendant. This opinion is reprinted in the Appendix at page 5a.

The Memorandum and Order of the United States District Court Eastern District of New York Denial of Motion For Reconsideration dated December 13, 2002. This opinion is reprinted in the Appendix at page 9a.

The Memorandum and Order of the United States District Court Eastern District of New York granting summary judgment to the defendant dated July 25, 2002. This opinion is reprinted in the Appendix at page 27a.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254, which provides that Cases in the courts of appeals may be reviewed by the Supreme Court "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The petition for certiorari is timely filed with this Court from the denial of the Petitioner's request for rehearing

on December 4, 2003 by the United States Court of Appeals For the Second Circuit.

STATEMENT OF FACTS

The background of case 02-6318 is that during the processing of my application for Civil Service Retirement System (CSRS) disability benefits, the agency (USPS) made **no** effort to attempt to accommodate and/or reassign me, as required by law in accordance with the Office of Personnel Management (OPM) publication Federal Personnel Manual (FPM) Supplement 830-1, Disability Retirement Chapter 60 (reprinted in **Appendix I pages 107a to 131a** as an excerpt from **Appellant Brief** in Case No. 02-6320 - **Appendix Exh. E**) which was the ruling authority at the time of the alleged discrimination in all three cases (March, 1993).

In case 02-6320, the claim is that I was discriminated against when this same agency refused to consider me for the position Operations Support Specialist (OSS), EAS-20, which I had applied for, on the basis that I had applied for CSRS disability retirement and a non-disabled employee was selected for the position.

This action was brought for discrimination in employment pursuant to American with Disabilities Act of 1990, as codified, 42 U.S.C. §§ 12112-12117 (amended by the Civil Rights Act of 1991, Pub. L. No. 102-166) and the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794 (a). Jurisdiction was specifically conferred upon the United States District Court by the aforementioned statutes, as well as 28 U.S.C. §§ 1331, 1343. Jurisdiction may also be appropriate under 42 U.S.C. §§ 1981, 1983 and 1985 (3), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-

166, and any related claims under New York law. Within 90 days of the commencement of the United States District Court action, the Equal Employment Opportunity Commission (EEOC) issued a right to sue letter.

REASONS FOR GRANTING THE PETITION

Probably the most compelling reason for granting the petition can be ascertained by reading EEO Administrative Judge David E. Licht's brilliant decision which fully recognized the issues of these cases when he ruled in a companion case now in Eastern District Court of New York as **Case No. CV-01-2600** and found not only that I was a qualified individual with a disability within the meaning of the Rehabilitation Act of 1973, but he also appropriately found that the agency, USPS, had discriminated against me. This decision is reprinted in **Appendix G pages 95a - 104a** and was reached without Judge Licht ever seeing the Doctor's Evaluation Letter dated March 11, 1993 (**Appendix J, page 132a**), which I did not receive until 1998 in discovery in my first civil case. This letter clearly establishes that the agency knew of my desire to be assigned to a local station near my home. Unfortunately, although I had the right to submit previously unavailable evidence when I filed my request for reconsideration in February, 1999, when I submitted it to the EEOC in response to their claim that no one in the agency knew of the accommodation I desired, the law was changed in November, 1999 and all cases in the pipeline incredibly and unjustly lost this right retroactively - but for that, we wouldn't be here!

I. THE QUALIFIED INDIVIDUAL WITH A DISABILITY ISSUE

The decision of the United States Court of Appeals For the Second Circuit, simply stated, was that, "Based on the record before us, we hold that the evidence is insufficient for a reasonable trier of fact to conclude that plaintiff was capable, at the time of the challenged employment actions, of performing the essential functions of the post office positions in question." I believe that the Court erred by failing to give sufficient weight to not just the decisions of an EEO Administrative Judge (AJ), and the EEOC, but the reasoning behind them. Finally, there are statements by two USPS officials indicating as a qualified individual with a disability I could have been accommodated.

These decisions ignored two decisions in my third companion case which is on hold at the United States District Court for the Eastern District of New York (**Case No. CV-01-2600**). That case relates to a discrimination incident where I was prevented from returning to work by the same discriminating official as in the non-promotion case, and it took place in the same timeframe (mid-March, 1993) as the other two cases before this Court. Magistrate Levy stated in his decision (**Appendix E, pages 49a-51a**) that an employee who cannot report to work cannot be considered a qualified individual (citing numerous case law), but in this case it was found that my supervisor prevented me from returning to work because I had applied for CSRS disability retirement. Surely the decision in this companion case is of great relevance to the outcome of the two cases before this Court.

I believe that the Court should accept these decisions as logical proof that reasonable triers of fact have found me

to be a qualified individual with a disability within the meaning of the Rehabilitation Act of 1973 and, therefore, the more complicated matters of jurisdiction, judicial estoppel and accommodation raised by the parties in these cases must also now be addressed by this Court. First, however, I feel obliged to provide details of these decisions, along with the two USPS officials' statements, as they were made prior to new evidence I obtained in discovery in Case 02-6320.

In his final decision in EEOC Hearing No. 160-97-8040X, AJ David E. Licht wrote regarding the case still in the Eastern District Court of New York as **Case No. CV-01-2600, Appendix G page 102a**–

> I find that the Complainant was a person with a disability as defined by the Statute and Regulations. I also find that he is a qualified individual in that, with or without reasonable accommodation he could perform the essential functions of the position if accommodated by any of the proposals presented to the Agency, including but not limited to use of a FlexiPlace work via modem or even to a local station near his home.

I have had an EEO AJ (David E. Licht) rule that I was discriminated against in a companion case and the EEOC decision in my Appeal of this same case was written up in the **Federal Equal Opportunity Reporter**, dated April 8, 1999, **Appendix H page 105a**, which summarized the EEOC findings in *Faconti v. Henderson*, EEOC 01976463, "The Commission found that the appellant was an individual with a disability. It further found that he was a 'qualified'

individual with a disability because he was able to perform the essential functions of his position when his back condition did not prevent him from doing so. In making this determination, the Commission noted that the appellant's representations in his application for disability retirement were not determinative with regard to whether he was a 'qualified' individual with a disability. The Commission went on to acknowledge the appellant's assertion that he would have been able to remain working if the agency had accommodated his condition." Thus, even though the EEOC ruled against me regarding the aspect of discrimination, I was found to be a qualified individual with a disability by the EEOC and it was reported in a noted publication that follows EEO decisions.

In the companion case decision, **Appendix F page 90a** (Appeal No. 01976463), the EEOC stated –

> Appellant asserts that he expressed the need to work at home or at a local station near his home in his application for disability retirement…There is no indication in the record that any agency official in a position to consider such an accommodation was aware of the contents of appellant's application for disability retirement…This is not a case where appellant failed to specify a necessary accommodation because of a lack of knowledge. Instead, the record indicates that appellant, in his mind, was clear about what he needed and how it could be implemented. However, he failed to communicate that information to management for their consideration…Liability for the failure to

> provide reasonable accommodations ensues only where the agency bears the responsibility for the breakdown.

Even though the EEOC did not find discrimination, the EEOC makes the point that I knew the accommodation I needed (to be transferred to a station near my home), but that somehow, the agency was not aware of this request, because it was 'hidden' in my application for disability retirement. Nevertheless, this finding establishes that I was considered a qualified individual with a disability by the EEOC and would have been able to continue my postal career, but for the alleged fact that I never communicated this desire to any agency official who was in a position to consider such a reassignment. For the EEOC to even reach the point of ruling on the accommodation issue, it had to find that I was a qualified individual with a disability and both AJ David E. Licht and the EEOC relied on my applicant statement (**Appellant Brief** in Case No. 02-6320 - **Appendix Exh. J**) in which I stated a desire to be assigned to a station near my home, "Another possible alternative would be to place me as a Station Manager at a station that is within walking distance or a very short ride from my home (i. e. 11204, 11214, 11219)" and my treating physician, Dr. Pace's physician's statement (**Appellant Brief** in Case No. 02-6320 - **Appendix Exh. I**), "The most demanding aspect of Mr. Faconti's work assignment is the commute to and from work...My recommendation is to try to accommodate Mr. Faconti with a managerial position at a local post office."

These conclusions that I was a qualified individual with a disability were **not** based on some of the most

compelling evidence which I obtained after these decisions were rendered, such as the Doctor's Evaluation letter **(Appendix J page 132a)** which shows an agency official was about to have me reassigned to a local station, the **FPM (Appendix I pages 121a and 123a)**, which establishes the authority for and specific obligations all federal agencies have once an employee files an application for CSRS disability retirement, stating in **Section 60A2.1-4 Accommodation - B. Reasonable Accommodation**, "Reasonable Accommodation is any action that the agency would be obligated to take under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.)," to "...exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement..." and in **Section 60A2.1-5 Reassignment**, to "...review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position." Finally, there is the EAS Vacancies letter dated March 9. 1993 (**Appellant Brief** in Case No. 02-6320 – **Appendix Exh. K**), establishing that a position I desired, Manager, Blythebourne Station (11219), was vacant at the time.

On March 11, 1993, the agency doctor had a letter sent to me, subject: Doctor's Evaluation letter **(Appendix J page 132a)** that stated, "The Doctor recommended that you be transferred to a station near your home." Thus, even the agency doctor believed, in the same timeframe, that I was a qualified individual with a disability. The great significance of this letter is that even if there was a question as to whether

I could perform the requirements of the position, the **FPM** instructions in **Section 60A2.1-5 Reassignment** (**Appendix I page 125a**) were for the agency to reassign me to the position on a detail –

D. When Agency Identifies Vacant Position	1. If the agency identifies an available vacant position for which the employee is minimally qualified, but has questions concerning his or her knowledge, skill, or ability to perform successfully, the agency should first detail the employee to the position.

We also have my supervisor's statement, from Peter Baylis, on my disability retirement application stating, "We can accommodate Mr. Faconti by structuring his work around his physical limitations…" (Index No. 98 CV 2075, **Depositions and Exhibits In Support of Plaintiff's Opposition to Motion For Summary Judgment** in the **Record on Appeal**, **Exh. PX17**) in a document the agency was to review. Certainly, the agency had an obligation to investigate the accommodation Mr. Baylis mentioned in his Supervisor's Statement, as the Instructions on the Guidelines form (**Appellant Brief** in Case No. 02-6318, **Appendix Exh. D**) state –

> The Coordinator for Employment of the Handicapped should review the Applicant's Statement, the Supervisor's Statement, the Physician's Statement, and any other relevant documentation on file to determine if reasonable accommodation will enable

> employee to perform fully successful service in his or her current position or **whether a vacant position is available in the agency, at the same grade or pay level in the same commuting area, for which the employee is qualified for reassignment**. Telephone numbers for the applicant, the supervisor, and the physician may be found on their respective statements, should it be necessary to contact them for further information.

Yet, Mr. Baylis was never contacted to discuss such an accommodation, as detailed in his Notarized Statement dated 2/24/99 (**Exh. PX29** *ibid*). Both statements by USPS officials (the Doctor's Evaluation letter and the Supervisor's Statement) contradict the Second Circuit's findings.

The Doctor's Evaluation letter is also the smoking gun that blows a hole in the EEOC's theory that no one in the agency in a position to consider my request for reassignment was aware of the accommodation I felt would have allowed me to continue working. Unfortunately, I never received the letter until **five** years later as part of discovery in this case, because the agency addressed it to 6616 Ovington Court and my address is 6618 Ovington Court! As such, the agency acted in bad faith and in accordance with legal precedent, the agency is guilty of violating the Rehabilitation Act. See ***Beck v. University of Wisconsin Bd. of Regents*** , 75 F.3d 1130 (7th Cir. 1996) "A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith..."

The Court of Appeals stated, "We need not reach the more complicated questions of jurisdiction, judicial estoppel and accommodation raised by both parties." I believe I have sufficiently pointed to irrefutable proof that reasonable triers of fact not only could but **have** found me to be a qualified individual with a disability and, therefore, this Court should now address these other more complicated issues.

II. THE ISSUE OF A SUCCESSFUL APPLICANT FOR CSRS DISABILITY RETIREMENT BEING AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY WITHIN THE MEANING OF THE REHABILITATION ACT OF 1973

In the statement from the CSRS disability retirement application form, Guidelines for the Coordinator of the Handicapped, it states –

> The **law** requires that where an employee who otherwise would be eligible for disability retirement initiates an application, the agency must review all vacant positions under its jurisdiction at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.

Both lower courts refused to support this law, as stated by OPM in the CSRS disability retirement application and mandated by obligation under the Rehabilitation Act as detailed in the **FPM** above on page 8. Failure to establish the sanctity of this law allows any federal agency to simply rubber stamp all applications for disability retirement and

justify making **no** effort to accommodate applicants for disability retirement by then claiming that once an employee receives disability benefits, the employee cannot be considered a qualified individual with a disability. This circular argument allows federal agencies to discriminate by granting disability retirement to employees who would otherwise be qualified to continue working with an accommodation and, thus, circumvent the Rehabilitation Act and the specific mandate for the federal government to be a model employer of the disabled. In many ways, this proposition is similar to the ***Cleveland v. Policy Mgmt. Sys., Inc.***, 526 U.S. 795 (1999) case where the District Court erroneously held that, "Cleveland, by applying for and receiving SSDI benefits, had conceded that she was totally disabled. And that fact, the court concluded, now estopped Cleveland from proving an essential element of her ADA claim, namely that she could "perform the essential functions" of her job, at least with "reasonable accommodation." The Supreme Court must see this does not happen to someone who is granted CSRS or FERS disability retirement because a federal agency that is mandated to be a model employer of the handicapped makes **no** effort to accommodate and or reassign an employee who applies for disability retirement.

In order to understand how I can make the claim that the agency made **no** effort to accommodate or reassign me, I must provide a detailed description of exactly what happened on my CSRS disability retirement application form. The most alarming fact regarding the USPS failure to accommodate and/or reassign me was their own documentation of the process that was performed to certify such efforts, contained

in the form filled out by the USPS titled **Agency Certification of Reassignment and Accommodation Efforts** form (**Appellant Brief** in Case No. 02-6318, **Appendix Exhibit E**). There were two key items, **4** and **5**, to be responded to by the agency (with the appropriate box to be checked). Specifically, in item **4**, the question is asked, **Has a reasonable effort for accommodation been made?** There are three boxes to choose to check, along with space below for any explanation. The boxes in sequence read –

☐ No, accommodation is not an option (Specify in the space below the functional/environmental factors related to the employee's inability to perform fully successfully and explain why accommodation is not possible.)

☐ No, accommodation is not appropriate. Medical information presented to agency does not document a disabling medical condition.

☐ Yes. Describe below accommodation efforts and attach supporting documentation.

Had the agency done their job properly and if it was truly believed and documented that there was no accommodation for my disability, then the first box should have been checked and an explanation as to why accommodation is not possible should have been specified in the space provided below item 4, along with the functional/environmental factors related to my inability to perform fully successfully. If, as the agency claimed in response to my Interrogatory #7 (See paragraph 37. on page 78 of my **Statement of Material Facts as to Which**

Genuine Issues Remain to Be Tried in the **Record on Appeal**), that, "...plaintiff had never previously advised the USPS of (or provided any medical documentation to substantiate) the nature of his disability or the limitations or restrictions on his ability to work...", then the second box should have been checked indicating that I had failed to document a disabling condition. If the agency had appropriately delivered **the Doctor's Evaluation** letter to me and documented this effort to accommodate me, then the third box should have been checked with a copy of the **Doctor's Evaluation** letter attached. Instead of any box being checked – **no** box was checked!

Next we have item **5**, which states, **"Results of agency reassignment efforts (*check one of the following statements*)"**

☐ Reassignment is not necessary because employee's service is fully successful and there are no medical restrictions from performing critical duties or from attending work altogether.

☐ Reassignment is not possible because there are no vacant positions at this agency at the same grade or pay level and tenure, within the same commuting area for which the employee meets minimum qualification standards.

☐ The employee was not reassigned to the vacant position(s) in this agency at the same grade or pay level and tenure, within the same commuting area for which the employee meets minimum qualifications. The position(s) identified and reason(s) for non-reassignment are shown below.

Position Title Reason for Non-Reassignment or Non-Selection

Had the agency believed that I was not disabled – that I had failed to document a disabling medical condition – it should have checked the first box. If after reviewing every vacant position, the agency found and determined, as is now the claim, that reassignment was not possible because there were no vacant positions at the agency at the same grade or pay level and tenure, within the same commuting area for which I met minimum qualification standards, the second box should have been checked. If after reviewing every vacant position, the agency found that there were vacant position(s) in the agency at the same grade or pay level and tenure, within the same commuting area for which I met minimum qualifications, but did not choose to reassign me, then the third box should have been checked with a listing of the Position Title and the Reason for Non-Reassignment or Non-Selection. Instead of any box being checked – **no** box was checked!

The agency never engaged in the interactive process, as evidenced by the agency's utter lack of even attempting to accommodate and/or reassign me in their failure to respond to items 4 and 5 on the Agency Certification form. There is no documentation on the very form the agency was required to document such efforts on while processing my application for disability retirement. Clearly, what we have here is an abdication of the accommodation and/or reassignment process on the CSRS disability retirement application form the agency was required to fill out.

III. THE ISSUE OF A PRO SE LITIGANT BEING TREATED WITH THE SAME STANDARD OF JUSTICE

I have been frustrated with the standard of justice a *pro se* litigant is afforded throughout the civil case procedure. In the United States Court of Appeals For the Second Circuit, at my oral briefs for both cases, the three presiding judges sat there motionless as if they had already made their decisions. The decision confirmed this belief, as it never even addressed any of my arguments and dismissed my appeal on the threshold issue of my not being a qualified individual with a disability, despite my Request for Rehearing pointing out the EEOC companion case decision in which I was declared to be a qualified individual with a disability. It was also troublesome that the decision is not allowed to be published. I can't help but feel that justice is denied to anyone who is not represented by a member of the fraternity of lawyers. I trust that at the highest court of the land, this will not be the case, based on the liberal pleading standard applied to pro se plaintiffs under ***Haines v. Kerner***, 404 U.S. 519, 520 (1972).

I am a student of the English language, as well as a NY State Certified and NY City Licensed High School English teacher. In the English language, words have meaning and when I read an instruction from the CSRS disability retirement application form, Guidelines for the Coordinator of the Handicapped, which states, "The **law** requires…" I expect a federal agency that violates the law to be held accountable by the federal court system. As a *pro se* litigant, I deserve that opportunity to have these cases heard by a jury and summary judgment is not warranted.

IV. THE ISSUE OF VIEWING EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY

As Magistrate Robert M. Levy stated correctly in **Appendix E page 40a** of his decision in these cases, "In deciding summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and decide only whether there is any genuine issue to be tried. ***Eastman Mach. Co. v. United States***, 841 F. 2d 469, 473 (2d Cir. 1988). The Supreme Court has ruled similarly, "on summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion," ***United States v. Diebold, Inc.***, 369 U.S. 654, 655 (1962) and more powerfully, "the evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 255 (1986) Unfortunately, I believe there were numerous instances where the evidence (affidavits, attached exhibits, and depositions) was **not** viewed in the light most favorable to me as the non-moving party.

The Magistrate falsely claimed, "At any rate, he testified at his deposition that he was not qualified for and was not interested in a Station Manager position at a post office near his home. **(USPS Undisputed Facts 57; USPS Supp. Undisputed Facts 6**. From the **Record on Appeal)**" I was an employee of the Brooklyn Post Office and if you were to examine the record of Undisputed Fact 57, it states, "Faconti did not apply for any of the following positions listed on Exhibit DX43: nine available positions in Manhattan entitled Manager, Customer Services." Clearly these positions were

not at a post office near my home in Brooklyn, which both I and my physician mentioned as a suitable accommodation, but these positions were instead in **Manhattan**! How does the Magistrate fail to make this realization? Further, as for the Magistrate's claim that I testified at my deposition that I was not qualified for a Station Manager position at a post office near my home, I responded to that false allegation by the defendant in my document **Statement of Material Facts as to Which Genuine Issues Remain to Be Tried pages 6 to 9** from **Case 98-CV-0275** in the **Record on Appeal**. The excerpt the Magistrate relied upon was taken out of context and the entire deposition segment reveals I never stated any such thing. Finally, the reason I did not put in for station manager positions in Brooklyn was because they were not posted until **after** I applied for CSRS disability retirement and I never saw the postings.

Again in the **USPS Undisputed Facts** on page 14, at item 57, the defendant states, "He did not apply for these positions because 'customer service is an area that I really was probably not qualified, in terms of my background.' **Faconti Depo. 91:24-93:13**, from the **Record on Appeal**." If the entire section of my deposition testimony referenced is reviewed, it is apparent that the above statement is taken out of context and disregards the completely detailed explanation of my not applying for those positions (92:14-93:13) –

14 Q. These were not positions that you thought
15 you were qualified to do?
16 A. These are not positions that I was
17 familiar with, shall we say.
18 Q. Were you qualified to do them?
19 A. I don't know. It wasn't something that I

was in a way interested in -- which ones specifically are we talking about?

Q. Well, there are nine customer services positions, eight are EAS-21 and one EAS 19 listed from, starting with Manhattan/Morningside and goes all the way down to Peter Stuyvesant Carrier Station,

F. Faconti

middle of the page 5040.

A. You are saying these manager customer services positions?

Q. Correct.

A. Well, now it shows a location, I am not sure what that job is. I never saw a job description of it. I don't know what that job is, manager customer services. In the old framework, they were nobody, a manager. If it is the same job, which I am not even sure it is, I don't know if that's at manager stations and branches, if that is the same job. I am not aware that was the same job.

Further, my testimony goes on to clearly explain why I didn't put in for jobs at other facilities in general (93:19-94:25) –

A. Again, I was very familiar and comfortable, as it were, I had been a Brooklyn boy all my life. That was my facility. I got them into that facility. In essence, if I was to return to work, that was the facility that I really was going to be most familiar with.

I would imagine there is a certain amount

F. Faconti

of anxiety not just for myself, aside from the physical situation that I was in, but a concern with every manager when they had to put in for those new jobs, that they had to potentially face the possibility of going to a new place. I somehow felt with my physical situation that I didn't need to contemplate trying to learn a whole new operation in addition to my problem physically that I had to deal with.

I didn't feel, for example, if it came to the point where I had to come back to work with accommodation, that such accommodation would be as forthcoming from a facility that potentially had no knowledge of me because, to be perfectly honest, my biggest, shall we say, supporters were people up in the region, people who had moved on from the region to headquarters, and maybe even, I would think, people in the local district to which I was assigned.

There was a whole different set of people I did not know and a situation where I did not feel comfortable putting in for a job in a facility I wasn't familiar with, even though I may have been qualified. And I also felt I was the best one qualified for the Brooklyn job.

In essence, at first I thought these were Customer Service Representative positions. Under the old structure, this title was a position that went to visit mailers and attempt to sell the USPS services. That's why I stated that they were "nobody", meaning nobody I was interested in, if that was

the position, but especially because they were in Manhattan. I then went on to attempt to clarify exactly what those positions were. I can't believe that these facts could be so misconstrued, first by Mr. Amanat and then by Magistrate Levy into my claiming that I was not qualified for nor was I interested in a local station position, as the entire discussion has **nothing** to do with any local (Brooklyn) station positions! In addition, the defendant's contentions, in **USPS Supp. Undisputed Facts 6**, that because I indicated I didn't want to work in a facility other than in Brooklyn, cannot be construed to exclude the local stations near my home, which were indeed in Brooklyn and closer to my home than the GMF. The defendant's leaps of undisputed fact are wholly unwarranted and should have been seen so by the Magistrate if he had viewed the evidence in the light most favorable to me.

Magistrate Levy alleges at footnote 15 **Appendix E page 55a** that, "Plaintiff states conclusorily that there must have been vacant Station Manager positions near his home because the USPS was going through a reorganization and all new management positions were placed up for bid. However, he points to no actual vacant position that he believes he could have performed." This is an incredible oversight and omission by Magistrate Levy, as at the oral briefs on October 11, 2001, I placed into evidence as Exhibit PX33 a copy of an EAS VACANCIES letter dated March 8, 1993, in the exact time frame when I was discriminated against (between January 4, 1993 and March 31, 1993), when the position I applied for was awarded to a non-disabled employee. This letter indicates the individual who was selected for the position Manager Customer Services

Blythebourne Station, which is 11219, one of the three stations I sought accommodation at. While it does not state the zip code, I specifically sought to place into evidence the Brooklyn Zip Code directory to establish that Blythebourne and 11219 were one and the same, but Magistrate Levy stated that it wouldn't be necessary, as he wanted to first establish whether failure to accommodate was going to be a part of his consideration in the cases. Nevertheless, this crucial piece of evidence was submitted at the oral briefs, as I had just obtained it prior to the oral briefs from an ex postal manager and it established that the vacant position I desired was available in the relevant timeframe. In my Request For Reconsideration, I pointed out this EAS Vacancy letter I had submitted and the Magistrate's response was, "Even if, as Faconti argues, Exhibit PX33 establishes that there was a vacant Station Manager position near his home, it does not show that plaintiff asked for or would have been able to perform that job." As stated above on page 9, had there been any question of my qualifications by the agency, the regulations from the **FPM** instruct the agency to detail the employee to the position.

But it doesn't end there. The issue of misapplication of the law is even more telling of Magistrate Levy's failure to fully examine my submissions in detail, for if he had, he would never have repeated Mr. Amanat's baseless contentions at footnote 17 in **Appendix E page 79a**, "As defendant points out, this obligation on the part of federal agencies to determine whether or not there are reasonable accommodations for an employee who has filed for disability retirement appears to exist in substantial part for the benefit of the government, not the employee. The obligation

apparently exists to ensure that no employee who is not so entitled is given disability benefits. Regardless, this court is aware of no authority, and plaintiff has cited none, for the proposition that an agency's failure to comply with the policies or requirements of the Federal Personnel Manual creates a cause of action under the Rehabilitation Act." In the **FPM** (**Appendix I Pages 121a**), under **Section 60A2.1-4 Accommodation - B. Reasonable Accommodation**, it states, "Reasonable Accommodation" is any action that the agency would be obligated to take under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq)." Amazingly, at the oral briefs, Magistrate Levy stated that he needed to determine how Reasonable Accommodation in the Federal Personnel Manual related to Reasonable Accommodation in the Rehabilitation Act. It was right there for his viewing and the following day, October 12, 2001, I submitted a letter to Magistrate in which I detailed the contents of the computer disk he had requested of my case submissions and I even pointed out that excerpt from the **FPM** to him with the hope that he would not miss the critical connection in the volume of thousands of pages of submissions and exhibits in this case. Nevertheless, he failed to properly establish that the law in this case is not the same as the multitude of cases he cites in his decision to grant summary judgment (Jackan v. New York State Department of Labor, Mengine v. Runyon, Taylor v. Principal Financial Group, Monette v. Electronic Data Systems Corp., Felix v. New York City Transit Auth., Mazza v. Bratton, etc.) since none of these cases involve a CSRS applicant for disability retirement. Once I applied for CSRS disability retirement, there was a procedure detailed in the **FPM** that requires **all** federal agencies to "...**exhaust all**

reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement" and to "...**review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.**" This obligation is not for benefit of the government, as it is an obligation all federal agencies must take under the Rehabilitation Act, which is clearly for the benefit of the disabled employee. The purpose of the Rehabilitation Act quoted from the act itself is –

(b) Purpose.--The purposes of this Act are--

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through--

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

These are just a few of the major instances where the Magistrate failed to view the evidence in the light most favorable to the non-moving party, the plaintiff, now appellant.

Viewing these pieces of evidence in the light most favorable to the non-moving party was Magistrate Levy's duty and he failed, as these above citations clearly establish that I never stated I was not qualified for and/or interested in a Station Manager position in a post office near my home, contrary to Magistrate Levy's contention in his decision. Instead, the exact opposite is true – that I desired such a position as an accommodation and my treating physician echoed this in his statement, as well. Further, I established that not only did I desire a local station management position as an accommodation, but that at least one was actually available at 11219, a station I specifically listed in my CSRS disability application. Viewing these facts in the light most favorable to me should have established that I sought an accommodation, the accommodation was available, if there was any question about my qualifications, the agency was obligated under the Rehabilitation Act to detail me to the position in question and the question for the jury to resolve is then did the agency make a reasonable attempt to accommodate and/or reassign me to the station management position?

V. THE ISSUE OF JURISDICTION

In the agency's final decision in **Case #4a 110 0173-99**, (now **Case #02-6318** from which I am appealing), the USPS states, under the heading "RIGHT TO FILE A CIVIL ACTION" –

If you are dissatisfied with the Postal Service's final decision in this case, you may file a civil action in an appropriate U.S. District Court within 90 calendar days of you receipt of the Postal Service's final decision.

Thus, the agency's own instruction to me was to file a civil action in the appropriate U.S. District Court, which is what I did. Now, when faced with this civil action, the agency claims that the U.S. District Court has no jurisdiction in this matter, that it is instead an MSPB case. In addition, the EEOC, in its Denial of Request For Reconsideration decision stated, "You have the right to file a civil action in an appropriate United States District Court..." Thus, even the EEOC directed me to file a civil action and I did.

I believe I have established sufficient basis for jurisdiction, but if this Court requires more, the ***Lindahl*** case provides just that, "while the factual underpinnings of § 8347 disability determinations may not be judicially reviewed, such review is available to determine whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.'" ***Lindahl***, 470 U.S. at 791 (quoting ***Scroggins v. United States***, 397 F.2d 295, 297 (Ct. Cl. 1968)). This is exactly the circumstance that has taken place in my case, where USPS substantially departed from important procedural rights I had when I filed my application for disability retirement, misconstrued the governing legal obligations under the Rehabilitation Act of 1973 to follow these procedures to accommodate applicants for CSRS disability retirement, all of which errors went to the heart of their administrative determination that "further accommodation cannot be made," when the agency failed to document **any** effort to do so, as required by law. It is this Court's duty to establish that what went wrong in my case **never** happens again to an applicant for CSRS or FERS disability retirement.

VI. THE ISSUE OF JUDICIAL ESTOPPEL

In the defendant's own **Appeal Brief** for **Case No. 02-6320** (page 20) it states, "***Cleveland*** noted that determinations of disability under the Social Security Act are not necessarily based on specific factual assessments of the applicant's medical condition vis-à-vis the actual physical demands of his job." Thus, it is indisputable that the ALJ's statements in my social security disability case determination did not take into account the issue of accommodation or the physical aspects of any accommodation that the USPS could have provided, especially the one I requested to a station near my home. ***Cleveland*** further noted that, "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." The social security disability request was filed a year after I filed my original claim of discrimination against the USPS. Is there no accountability for an agency that fails to accommodate an employee's disability in what might be termed a "window of opportunity" for the employee to return to work, when the failure to accommodate results in the disability getting worse by the stress of having no job?

In addition, the doctrine of judicial estoppel does not apply "when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." See ***Konstantinidis v. Chen***, 200 U.S. App. D.C. 69, 626 F.2d 933, 936-38 (D.C. Cir. 1980), which goes on to state, "The party seeking to invoke the estoppel, however, must have been an adverse party in the prior proceeding, must have acted in reliance upon his opponent's prior

position, and must now face injury if a court were to permit his opponent to change positions." Summary Judgment was improperly granted in this case by the Magistrate based on judicial estoppel, claiming things I wrote or stated in letters, in my application for **SSA** and **CSRS** disability retirement were inconsistent with my position in these cases. The ***USPS*** was **not** an adverse party and did not "acquiesce" in the prior proceeding and accordingly any statements I made in my application for **SSA** benefits or in my request for reconsideration for **CSRS** disability benefits to **OPM**, which were made **after** USPS recommended my disability retirement (so we were ostensibly on the same side except for the fact that I was unaware that they had made no effort to accommodate or reassign me) cannot legally be used as a basis for judicial estoppel, which is what Magistrate Levy did. As for any seeming inconsistencies in my CSRS disability application, I again refer this Court to the application itself where I stated a sincere desire to continue working for the USPS with several accommodations I specifically listed. In addition to my above stated (page 7) desire to be assigned to a station near my home was the suggestion I expressed about doing computer work from home until I could return to work, "I know this sounds unorthodox, but I have much to contribute and the technology is available to allow for such an arrangement (perhaps with the New York City Satellite Video Facility)."

There is an explanation for any of these apparent inconsistencies and I was not in any way trying to play fast and loose with the federal court system. There was a window of opportunity when I could have and legally should have been accommodated by the USPS, but I never received the

Doctor's Evaluation letter until 1998. When I read the USPS statement on my disability retirement application (Agency Certification form), "since further accommodations cannot be made, I recommend disability retirement," I was unaware of the **FPM** and the legal obligations for USPS to accommodate me by reviewing every vacant position, I was falsely led to believe that there was no accommodation available, so any statements I made about USPS being unable to accommodate my disability were true based on the information I knew at the time (**I didn't know the doctor had determined that I should be assigned to a local station**). Statements made on the CSRS disability application by my treating physician and I cited as cause for judicial estoppel by the Magistrate ignore other key statements that clearly refer to my desire for accommodation and to continue to work for the USPS. To allow a federal agency to discriminate against an employee, and ten years later dig up a statement the employee has made since the discrimination and distort, twist and use it illegally (**SSA**) against the employee to dismiss the discrimination is tantamount to open season on the disabled, especially when the USPS failed to deliver a letter that ostensibly would have enabled the employee to be accommodated.

VII. THE ISSUE OF ACCOMMODATION

This Court is not the trier of fact with regard to whether the USPS failed to accommodate my disability. That is the function of the jury, once the cases have been remanded back to the United States District Court for the Eastern District of New York for a jury trial. What this Court may and should decide is the precedent setting decision regarding the **FPM** detailed federal agency

obligations, which are alive and well in the latest version (the **CSRS/FERS Handbook, Chapter 60, Disability Retirement** which replaced the **FPM** – the wording and legal obligations remain the same to this day) and how it changes the landscape for the legal requirements under the Rehabilitation Act of 1973 for accommodation once an employee files an application for CSRS disability retirement.

CONCLUSION

I have been patiently pursuing these cases for over ten years and to have the Appeals Court put forth a Summary Order that I am not a qualified individual with a disability (when an EEO AJ, the EEOC and two USPS officials have declared me to be just that), that my claims are meritless (when I have presented an incredible account of a federal agency's failure to follow legal requirements which in turn resulted in a discriminatory failure to accommodate my disability) and then provide no comment about the more complicated issues of jurisdiction, judicial estoppel and accommodation has been disappointing. I hope this Court reverses these mistakes in law by taking up these matters and granting this Petition.

Respectfully submitted,

_____

Frank P. Faconti,
Pro Se
Plaintiff – Appellant

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

ROSEANN B. MACKECHNIE
CLERK

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of Dec. two thousand three.

Present:

Hon. Roger J. Miner

Hon. Guido Calabresi

Hon. Chester J. Straub

CIRCUIT JUDGES,

FILED

DEC 30 2003

Faconti

v

Potter

Docket No. 02-6320

A petition for panel rehearing having been filed herein by Frank P. Faconti

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By:
"S/_____"
Laura Bass Penn
Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

ROSEANN B. MACKECHNIE
CLERK

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of Dec. two thousand three.

Present:

Hon. Roger J. Miner

Hon. Guido Calabresi

Hon. Chester J. Straub

CIRCUIT JUDGES,

FILED
DEC 4 2003

Faconti

v

Docket No. 02-6318

Potter

A petition for panel rehearing having been filed herein by Frank P. Faconti

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By:
"S/_____"
Laura Bass Penn
Motions Staff Attorney

EDNY/BKNY
01-cv-1034
98-cv-275
Levy

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of Oct, two thousand and three.

PRESENT:

HON. ROGER J. MINER,
HON. GUIDO CALABRESI,
HON. CHESTER J. STRAUB,

FILED
OCT 9 2003

Circuit Judges,

FRANK P. FACONTI,

Plaintiff-Appellant,

v. Nos. 02-6318
02-6320

JOHN E. POTTER, Postmaster General,

Defendant-Appellee.

For Plaintiff-Appellant: FRANK P. FACONTI, *pro se*, Brooklyn, NY

For Defendant-Appellee: F. FRANKLIN AMANAT, Assistant United States Attorney, *for* Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York (Varuni Nelson, Assistant United States Attorney, *on the Brief*), Brooklyn, NY

Appeals from the United States District Court for the Eastern District of New York (Levy, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

This order addresses separate appeals from two actions brought by *pro se* plaintiff-appellant Frank P. Faconti against defendant-appellee Postmaster General John E. Potter in the United States District Court for the Eastern District of New York (Levy, *M.J.*). In the first action, filed in 1998, plaintiff claimed that a March 1993 decision of the United States Postal Service ("USPS") not to select him for the position of Operations Support Specialist, EAS-20, constituted unlawful disability discrimination, in violation of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* (2000). In the second action, filed in 2001, plaintiff claimed that USPS failed to take steps to accommodate his disability before supporting his application for disability retirement under the Civil Service Retirement System, also in violation of the Rehabilitation Act, *id.* In both actions, the district court awarded summary judgment to the defendant.

We review the district court's grant of summary judgment *de novo*. *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F. 3d 83, 90 (2d Cir. 2002). Summary judgment is appropriate if the evidence is such that a reasonable factfinder would be "compelled to accept the view of the moving party." *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998) (internal quotation marks and citation omitted). That is the situation before us. Accordingly, we affirm.

To prevail on a Rehabilitation Act claim, plaintiff must prove, *inter alia*, that he is an "otherwise qualified individual" – that "with reasonable accommodation, he could perform the essential functions of the position(s) sought." *Stone v. City of Mount Vernon*, 118 F.3d 92, 96 (2d Cir. 1997); *see also* 29 U.S.C. § 794(a). Based on the record before us, we hold that the evidence is in sufficient for a reasonable trier of fact to conclude that plaintiff was capable, at the time of the challenged employment actions, of performing the essential functions of the post office positions in question. Because, with respect to both actions, plaintiff has not shown that he is an "otherwise qualified individual" within the meaning of the Rehabilitation Act, his claims must fail. As a consequence, we need not reach the more complicated questions of jurisdiction, judicial estoppel, and accommodation raised by the parties.

We have considered all of the appellant's claims and find them meritless. We therefore AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKECHNIE,
Clerk of the Court
By: "S/_____"

Lucille Carr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

Frank Peter FACONTI,

Plaintiff,

-against-

John E. POTTER, Postmaster General of the United States,

Defendant.

----------X

MEMORANDUM AND ORDER

98 CV 0275 (RML)
01 CV 1034 (RML)

APPEARANCES:

Frank Peter Faconti
6618 Ovington Court
Brooklyn, New York 11204
Plaintiff *pro se*

Roslynn R. Mauskopf
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201-2776
BY: F. Franklin Amanat, Esq.
Counsel for the Defendant

LEVY, United States Magistrate Judge:

This case appears before me on consent of the parties pursuant to 28 U.S.C. § 636(c)(1). Currently pending is plaintiff's motion for reconsideration of this court's Memorandum and Order dated July 25, 2002 (the "M & O"), granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment. For the reasons stated below, plaintiff's motion for reconsideration is denied.

BACKGROUND AND FACTS

The factual and procedural background of these cases is described in great detail in the M & O, with which familiarity is assumed. Briefly, however, plaintiff Frank Faconti ("plaintiff" or "Faconti") was a management employee of the United States Postal Service ("USPS" or the "Postal Service"), working in the Brooklyn General Mail Facility ("GMF") as a computer specialist in the position of Postal Operations Office Field, EAS-20. In 1998 and 2002, he initiated these actions against the Postmaster General pursuant to the anti-discrimination provisions of the Rehabilitation Act, 29 U.S.C. §§ 705, 794, and 794a. It is undisputed that Faconti was involved in a non-job-related automobile accident in 1992, which resulted in a herniated disc and caused him to experience severe pain in his lower back. While Faconti was out on medical leave following the accident, USPS underwent a nationwide reorganization that eliminated all supervisory positions in the Postal Service, including Faconti's position, and created new management positions, for which affected employees were required to bid.

On January 5, 1993, while still out on leave, Faconti applied for a position in the GMF called Operations Support Specialist, EAS-20 (the "OSS position"), which Faconti describes as "essentially the identical position" to the one he had been performing for the previous eight years. On March 31, 1993, another applicant for that position was competitively selected over plaintiff.

At the same time, however, Faconti applied for a disability retirement annuity under the Civil Service Retirement Act, 5 U.S.C. § 8337 (the "CSRA"), which requires an applicant to demonstrate that he or she is:

> unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.

5 U.S.C. § 8337. In an effort to satisfy that requirement, both in his initial application and in his later request for reconsideration, Faconti made numerous statements concerning his inability to work or commute due to his back injury. He also submitted medical reports from his treating neurologist, Dr. Leonard Pace, stating that Faconti was unable to sit, stand, or walk long enough to commute or meet

the physical demands of his job. Faconti's application was ultimately successful, and he began receiving CSRA annuity payments in January 1994.

In his two lawsuits, Faconti argues that the Postal Service violated the Rehabilitation Act, first by not selecting him for the OSS position in March 1993, and then by not finding and providing him with a reasonable accommodation for his disability. This court granted defendant's motion for summary judgment with respect to both cases.

DISCUSSION

Although Faconti does not say so explicitly in his submissions, he presumably brings this motion for reconsideration pursuant to Fed. R. Civ. P. 59(e), which permits a party to move to alter or amend a judgment within ten days after entry thereof.[1] "'A motion for reconsideration should be granted only where the moving party demonstrates that the Court has overlooked factual matters or controlling decisions that were presented to it on the underlying motion.'" Whiteman v. Federal Republic of Austria, No. 00 Civ. 8006, 2002 WL 31368236, at *1 (S.D.N.Y. Oct. 21, 2002) (quoting Adiel v. The Pharmacy Fund, Inc., No. 00

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[1] Faconti acknowledges that he did not comply with Local Rule 6.3, which requires a party seeking reconsideration to file a notice of motion and supporting memorandum of law. (See Opposition to Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Reconsideration, dated Oct. 1, 2002, at 1.) Given plaintiff's *pro se* status, the court will accept and address his submissions.

Civ. 3273, 2000 WL 1634381, at *1 (S.D.N.Y. Oct. 30, 2000), and citing Local Civil Rule 6.3; Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)). This standard is narrowly construed against the moving party to "dissuade repetitive arguments on issues that have already been considered fully by the court." Caleb & Co. v. E.I. DuPont De Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985); see also Schrader, 70 F.2d at 257 (reconsideration "should not be granted where the moving party seeks solely to relitigate an issue already decided"); In re Health Mgmt. Sys. Inc. Secs. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (reconsideration of a court's previous order is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources") (internal quotation marks and citation omitted); In re Houbigant, Inc., 914 F. Supp. 997, 1001 (S.D.N.Y. 1996) (a motion for reconsideration is not an opportunity for the moving party "to argue those issues already considered when a party does not like the way the original motion was resolved"). Furthermore, the moving party may not "advance new facts, issues or arguments not previously presented to the Court." Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md., 768 F. Supp. 115, 116 (S.D.N.Y. 1991). These limitations are designed to ensure finality and prevent Rule 59 from becoming a vehicle by which a losing party may examine a decision "and then plug[ ] the gaps of the lost motion with additional matters." Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (internal quotation marks and citation omitted). The decision to grant or deny the motion is within the court's sound discretion.

See Devlin v. Transp. Communications Int'l Union, 175 F.3d 121, 132 (2d Cir. 1999) (citation omitted).

Faconti's voluminous affidavit urges reconsideration on essentially three grounds. First, he contends that the court failed to consider Exhibit PX33, which he claims establishes that there was a vacant Station Manager position at the Blythebourne Station in Brooklyn during the relevant time frame, which was allegedly near his home and which he allegedly desired. (See Affidavit of Plaintiff in Support of Notice of Motion for Reconsideration, sworn to August 5, 2002 ("Faconti Aff."), at 5-6.)[2] However, even if this exhibit does establish that there was a vacant Station Manager position at that station, it does not establish, and plaintiff submitted no evidence to prove, (a) that he ever applied for or expressed interest in that position, (b) what the required qualifications were for that position, (c) whether plaintiff had any of those qualifications, (d) what the essential functions were of that job, (e) what physical activities were needed to perform those essential functions (*i.e.*, sitting, standing, or walking for more than fifteen minutes at a time); or (f) whether Faconti had the physical capacity at that time to perform those essential functions.

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[2] Exhibit PX33 is a memo dated March 8, 1993, addressed to Mr. Thomas Bay, the District Manager of the USPS Triboro District, listing Irving Kaminsky as the individual who had been selected to fill a vacancy for the position of "Manager Customer Services" of the Blythebourne Station.

As this court explained in the M & O, to make out a *prima facie* claim of discriminatory failure to provide a reasonable accommodation, a plaintiff must prove that (1) the plaintiff is an individual with a disability; (2) with or without reasonable accommodation, the plaintiff could perform the essential functions of a position he or she holds or desires within the agency; (3) the employer had notice of the plaintiff's disability; and (4) the employer refused to provide a reasonable accommodation. See Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir. 2000); Mitchell v. Washingtonville Central Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999). It is the employee's burden to establish each of these elements. Parker, 204 F.3d at 332. On a motion for summary judgment, the plaintiff cannot meet that burden with "[s]tatements that are devoid of any specifics, but replete with conclusions. . . ." Bickerstaff v. Vassar College, 196 F.3d 435, 452 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000). When an employee cannot perform the essential functions of his or her position even with reasonable accommodation, "'*the employee* has a duty to identify a vacant, funded position whose essential functions he is capable of performing.'" Jackan v. New York State Dep't of Labor, 205 F.3d 562 (2d Cir.) (quoting Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997)) (emphasis added), cert. denied, 531 U.S. 931 (2000). See also Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999) ("[T]he duty to provide a reasonable accommodation is not triggered until a specific demand for an accommodation has been made"); Taylor v. Principal Fin. Group, 93 F.3d 155, 165 (5th Cir. 1996) ("If the employee fails to request an accommodation, the employer cannot be held liable for

failing to provide one"); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996) (ADA plaintiff "bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable"); Felix v. New York City Transit Auth., 154 F. Supp. 2d 640, 656 (S.D.N.Y. 2001) ("the initial burden of requesting an accommodation is on the employee"); Mazza v. Bratton, 108 F. Supp. 2d 167, 176 (E.D.N.Y. 2000) ("A claim of disability discrimination. . . based on failure to accommodate is not made out under the ADA unless the employee's request for a reasonable accommodation has been denied by the employer"), aff'd, No. 00-9146, 2001 WL 363513 (2d Cir. Apr. 11, 2001), cert. denied, 122 S. Ct. 199 (2001). The employee must request the reasonable accommodation while still on the job. See Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 847-48 (8th Cir.), cert. denied, 528 U.S. 1050 (1999); Adams v. Rochester Gen. Hosp., 977 F. Supp. 226, 235 (W.D.N.Y. 1997); see also Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1570 (S.D. Ga. 1995) ("it is simply too late to raise suggested accommodations two years later in a summary judgment response brief"), aff'd mem., 106 F.3d 417 (11th Cir. 1997). "If it turns out there is no job which the worker (with or without accommodation) is capable of performing, then the [employer] cannot be held liable for [a] . . . Rehabilitation Act violation." Mengine, 114 F.3d at 420.

Even if, as Faconti argues, Exhibit PX33 establishes that there was a vacant Station Manager position near his home, it does not show that plaintiff asked for or would have been able to perform that job. As explained in the M & O, plaintiff admitted that he did not apply for a Station Manager position. Moreover, although plaintiff's application for

disability retirement benefits mentions the "possible alternative" of placing him "as a Station Manager at a Station that is within walking distance or a very short ride from my home," that statement cannot be considered a request for a specific accommodation, since it was made in the context of a disability retirement application in which he had the burden of showing that no reasonable accommodation existed. See Wakley v. Office of Personnel Mgmt., No. 01-3183, 2001 WL 1181771, at *1 (Fed. Cir. Oct. 4, 2001) (in order to qualify for disability retirement benefits, a federal employee must prove entitlement to such benefits by a preponderance of the evidence), cert. denied, 122 S. Ct. 1919 (2002). It is undisputed that Faconti never approached anyone in his chain of command to request a Station Manager position. More importantly, even if he had, Faconti submitted nothing in connection with the summary judgment motions to show that he could have performed the essential functions of a Station Manager position. He presented no evidence of what that job entailed, or how he could have performed that job in his physical condition.

Faconti's second argument is that this court failed to consider his point concerning section 60A2.1-4 of the Federal Personnel Manual, Supplement 830-1,[3](See Exhibit J

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[3] As noted in the M & O, this section of the Federal Personnel Manual, annexed to plaintiff's moving papers as Exhibit J, states in relevant part:

> Federal policy regarding the employment of handicapped persons

advocates that Federal agencies attempt to retain disabled employees by accommodating their disability. Therefore, the agency must exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement.

* * *

Reasonable accommodation obligations apply both to the employee's current position and to any vacant position to which the employee could be reassigned.

* * *

Thus, when an employee initiates an application for disability retirement, the employing agency must review all vacant positions under its jurisdiction, at the same grade or pay level and

at 13-14.) which, according to plaintiff, obligated the Postal Service to reject his application for disability retirement benefits and instead seek out another position he could have performed in or near his home. Far from "overlook[ing]" this argument, however, the court addressed it directly by explaining that, even assuming *arguendo* that this is an accurate description of federal policy, it is not what the Rehabilitation Act requires. Rather, under the Rehabilitation Act, "it falls to the employee to make at least a facial showing that there were vacant, funded positions whose essential functions he was capable of performing." Mengine, 114 F.3d at 418 (quotation marks and citation omitted). And, as explained above, it is the employee's burden to request the

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tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.

accommodation. No provision of the Federal Personnel Manual can shift the employee's burdens to the government.[4]

Faconti's second argument is that this court failed to consider his point concerning section 60A2.1-4 of the Federal Personnel Manual, Supplement 830-1,[5](See Exhibit J

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[4] As the Second Circuit explained in Jackan, there are some federal regulations that impose an obligation upon an employer to take affirmative steps to assist an employee in identifying potential accommodations. See Jackan, 205 F.3d at 567 n.4. However, "[t]he question whether an employer bears a legal duty to assist an employee in identifying appropriate vacant positions in the immediate aftermath of a request for reasonable accommodation is analytically distinct from the question of which party bears the burden of persuasion on the existence of a vacancy in litigation." Id. Thus, "when an employee sues for failure to accommodate reasonably by transfer to a vacant position, the employee has the burden of proving that a suitable vacant position existed." Id.

[5] As noted in the M & O, this section of the Federal Personnel Manual, annexed to plaintiff's moving papers as Exhibit J, states in relevant part:

> Federal policy regarding the employment of handicapped persons advocates that Federal agencies

attempt to retain disabled employees by accommodating their disability. Therefore, the agency must exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement.

* * *

Reasonable accommodation obligations apply both to the employee's current position and to any vacant position to which the employee could be reassigned.

* * *

Thus, when an employee initiates an application for disability retirement, the employing agency must review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to

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determine if the employee meets the minimum qualification standards for any vacant position.

accommodation. No provision of the Federal Personnel Manual can shift the employee's burdens to the government.[6]

Third, Faconti takes issue with this court's agreement with the numerous cases holding that an "essential function of any government job is an ability to appear for work . . . and to complete assigned tasks within a reasonable period of time." Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994). See also Nowak v. St. Rita High Sch., 142 F.3d 999, 1002-03 (7th Cir. 1998) (plaintiff failed to demonstrate that he was a qualified individual with a disability given undisputed evidence that he failed to meet attendance requirements for his position); Tyndall v. National Ed. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) ("In addition to possessing the skills necessary to perform the job in question, an employee must

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[6] As the Second Circuit explained in Jackan, there are some federal regulations that impose an obligation upon an employer to take affirmative steps to assist an employee in identifying potential accommodations. See Jackan, 205 F.3d at 567 n.4. However, "[t]he question whether an employer bears a legal duty to assist an employee in identifying appropriate vacant positions in the immediate aftermath of a request for reasonable accommodation is analytically distinct from the question of which party bears the burden of persuasion on the existence of a vacancy in litigation." Id. Thus, "when an employee sues for failure to accommodate reasonably by transfer to a vacant position, the employee has the burden of proving that a suitable vacant position existed." Id.

be willing and able to demonstrate these skills by coming to work on a regular basis" and an individual who "cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA"); Carr, 23 F.3d at 529 ("coming to work regularly" is an "essential function"); Mazza, 108 F. Supp. 2d at 175 ("an individual is not qualified for his position if he is unable to come to work"); Bobrowsky v. New York City Bd. of Educ., No. 97 CV 874, 1999 WL 737919, at *4 (E.D.N.Y. Sept. 16, 1999) ("'an employee cannot be considered otherwise qualified when she is unable to report to work at the time required, because she is not able to perform the essential functions of her job'") (quoting Davis v. Bowes, No. 95 Civ. 4765, 1997 WL 655935, at *16 (S.D.N.Y. Oct. 20, 1997)), aff'd mem., 213 F.3d 625 (2d Cir. 2000); Kotlowki v. Eastman Kodak Co., 922 F. Supp. 790, 798 (W.D.N.Y. 1996) ("The ADA does not require an employer to accommodate an employee who cannot get to work"). He points to an EEOC decision from 1994, Southerland v. USPS, EEOC Request No. 05930714, 1994 WL 728020, at *6 (E.E.O.C. July 15, 1994), which he cited in his reply brief in opposition to the defendant's motion for summary judgment, and which he claims stands for a different rule.

First, "[i]t is well established that EEOC decisions and precedents do not have controlling precedent in federal courts." Tewelde v. Albright, 89 F. Supp. 2d 12, 16 n.4 (D.D.C. 2000). Thus, this court cannot have "overlooked" a decision that has no binding authority. Second, Southerland pre-dates all of the above cases, which hold explicitly that regular attendance is in most circumstances an essential function of any job. Finally, Southerland does not describe

accurately the burdens attendant to a Rehabilitation Act case. In Southerland, the appellant, who was terminated from his position as a letter carrier for being absent without official leave, claimed discrimination on the basis of his mental disability, major depression with psychotic features. The Commission held that "in a case involving excessive absences from work, a complainant may prove that he or she is a 'qualified disabled person' – in spite of such absences – by first showing that there is a sufficient nexus between the absences and the purported disability." Southerland v. Runyon, 1994 WL 728020, at *6. According to Southerland, the burden then shifts to the employer to demonstrate that it would "pose an 'undue hardship' for the [employer] to tolerate or excuse an employee's absences for a time." Id.

As this court explained in the M & O, a plaintiff bringing a discrimination claim under the Rehabilitation Act has the burden of proving that he or she is "otherwise qualified" to do the work, meaning that the employee could perform the essential functions of a job he or she holds or desires with or without reasonable accommodation. See 29 U.S.C. § 794(d); see also Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 149-50 (2d Cir. 1998); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 383 (2d Cir. 1996). In most cases, it is necessary for the employee to be physically present to perform the essential functions of his or her job. To be sure, there may be cases where a plaintiff can satisfy his or her burden by proving that he or she can perform the essential functions of the job without attending work, but regardless, that is the plaintiff's burden. To the extent Southerland shifts the burden to the employer to prove that it would be undue hardship for the disabled employee to

be absent for extended periods, Southerland is out of step with established law.

I have reviewed plaintiff's submissions thoroughly and find his remaining arguments meritless. In short, plaintiff cites no controlling legal authorities that the court overlooked or ignored in rendering its decision. Nor does he point to any evidence that the court failed to consider. Rather, plaintiff repeats or rephrases the arguments he raised in his original submissions. Plaintiff may disagree with this court's decision, but that is not a proper ground for bringing a motion for reconsideration under Rule 59(e). Plaintiff fundamentally disagrees with this court's interpretation of the law, and his remedy is to file an appeal and seek to convince an appellate court of the merits of his position. Accordingly, the motion is denied.

SO ORDERED.

Dated: Brooklyn, New York
December 13, 2002

"S/_____"
ROBERT M. LEVY
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Frank Peter FACONTI,

Plaintiff

-against-

John E. POTTER, Postmaster General of the United States,

Defendant.

----------X

MEMORANDUM AND ORDER

98 CV 0275 (RML)
01 CV 1034 (RML)

APPEARANCES:

Frank Peter Faconti
6618 Ovington Court
Brooklyn, New York 11204
Plaintiff *pro se*

Alan Vinegrad
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 16th Floor
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BY: F. Franklin Amanat, Esq.
Counsel for the Defendant

LEVY, United States Magistrate Judge:

Pending before the court are the cross-motions of defendant John E. Potter, Postmaster General of the United States ("defendant" or the "Postmaster General"), for summary judgment and of plaintiff Frank Peter Faconti ("plaintiff" or "Faconti") for partial summary judgment on the case with docket number 98 CV 0275 (the "1998 action"). For the reasons stated below, defendant's motion is granted and plaintiff's motion is denied. Also pending is defendant's motion to dismiss the complaint, or in the alternative for summary judgment, in the case with docket number 01 CV 1034 (the "2001 action"). For the reasons stated below, that motion is granted.[1]

PROCEDURAL HISTORY AND UNDISPUTED FACTS

Plaintiff was a long-time management employee with the United States Postal Service ("USPS" or the "Postal Service"), working in the Brooklyn General Mail Facility ("GMF")[2] as a computer specialist in the position of Postal Operations Office Field, EAS-20 (the "POOF position"). On January 14, 1998, he initiated the 1998 action

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[1] On February 21, 2001 and May 8, 2001, respectively, the parties consented to have both of these matters assigned to a Magistrate Judge for all purposes, including entry of judgment, pursuant to 28 U.S.C. § 636(c)(1).

[2] The Brooklyn GMF was located at Cadman Plaza, but in July 1992, after the car accident that caused plaintiff's disability, the facility relocated to 1050 Forbell Street

against the Postmaster General pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* (2000), and particularly the anti-discrimination provisions of that statute, 29 U.S.C. §§ 705, 794, and 794a. On February 21, 2001, plaintiff filed a second complaint against the Postmaster General, also pursuant to the Rehabilitation Act. For purposes of the pending motions, the uncontroverted facts are as follows:

On March 29, 1992, Faconti was involved in a serious non-job-related automobile accident, resulting in a herniated disc. That injury caused him to suffer severe pain in his lower back. Although he returned to work on March 31, 1992, Faconti took sick leave from May 5 through June 1, 1992. (Defendant's Statement of Facts as to Which No Genuine Issue Remains to be Tried, dated April 30, 2001 ("USPS Undisputed Facts"), ¶¶ 16-18; Affidavit of Frank Faconti in Support of Motion for Partial Summary Judgment, sworn to April 25, 2001 ("Faconti Aff."), ¶ 4.) Faconti returned to work on June 2, 1992, but on August 14, 1992 he went out on leave again. (USPS Undisputed Facts ¶¶ 39-40.) He never returned to work at the Postal Service.

During this same period, USPS was undergoing a nationwide reorganization of its workforce, which eliminated all supervisory positions in the Postal Service, including Faconti's position, and created new management positions. (Id. ¶ 50.) Affected employees were required to bid for positions in the new management structure. On January 5, 1993, while still out on leave, Faconti applied for a position in the GMF called Operations Support Specialist, EAS-20 (the "OSS position"). (Id. ¶¶ 39-40, 53; Faconti Aff. ¶ 6.) Faconti describes that position as "essentially the

identical position" to the one he had been performing for the previous eight years. (Faconti Aff. ¶ 6.) On March 31, 1993 another applicant for that position, Gary Ricci, was competitively selected over plaintiff.

Meanwhile, on January 19, 1993, two weeks after he applied for the OSS position and more than five months after he had begun his leave of absence, Faconti applied for a disability retirement annuity under the Civil Service Retirement Act, 5 U.S.C. § 8337 (the "CSRA"). (USPS Undisputed Facts ¶¶ 76-88). In support of that application, Faconti attached a medical report from his treating neurologist, Dr. Leonard Pace, dated January 5, 1993 (the same day Faconti applied for the OSS position), stating that Faconti was physically "unable to continue in his present work assignment." (Id. ¶¶ 76-78, 82-85.) Dr. Pace further stated that it would take Faconti

> [a] minimum of six months from the present, if at all, to sufficiently recover to be able to drive or ride in a car or bus for extended periods of time (a half hour or more) in order to commute. . . . It is not presently known if there will be a full or even partial recovery, but his rehabilitation will be a continuing slow process.
>
> His job activities must be with minimal standing and/or walking and both his work and outside activities are impacted

> such that driving or riding in motor vehicles or buses must be extremely limited. As such, the daily half hour commute to work is too stressful for his condition, and in my estimation, will continue to be so for at least another six months and probably longer. . . . My recommendation is to try to accomodate [sic] Mr. Faconti with a managerial position at a local post office.

(Exhibit B; USPS Undisputed Facts ¶¶ 82-85.) Faconti also provided OPM with Dr. Pace's earlier notes, which stated that Faconti "requires strict bed rest," "is not able to perform the physical requirements of his job," and "is unable to return to his current work assignment in the postal service." (USPS Undisputed Facts ¶¶ 41-47.) In addition, in support of his application Faconti stated, under oath:

> I am not able to stand for any more than15 minutes without significant lower back pain and I can only sit for several hours at a time before I need to lie down (even with a lumbar support chair & orthopedic pillow). I also have difficulty driving any distance and the daily grind of one hour a day to

and from work makes it impossible for me to perform, attend, or conduct the activities of my job.

. . .Walking and standing are difficult tasks. Sitting for long periods of time is also painful, and despite having a new car, I dread the thought of driving due to the pain I experience entering and exiting the vehicle. . . .

The same basic restrictions of activities imposed by my medical condition described above make my ability to perform in other positions for which I may be qualified very limited. If I sit at a computer, I need to take periodic breaks to lie down and this will be difficult to accommodate. In addition, when pain intensifies, the pain killer medication I take makes it unadvisable to drive a car.

. . .The best accommodation that could be made would be to

> allow me to perform computer related activities from home via modem. This would allow me to work as long as my condition allowed, take a rest and go back to work, then rest and avoid the daily grind of traveling that is the biggest obstacle of my returning to work. . . .[T]he technology is available to allow for such an arrangement (perhaps with the New York City Satellite Video Facility). Another possible alternative would be to place me as a Station Manager at a Station that is within walking distance or a very short ride from my home. . . .

(Id. ¶ 78.) OPM initially denied Faconti's application, and he requested reconsideration, stating:

> To put it in layman's terms, if I have to drive to work (or be driven. . .) and I am in such pain that when I get there I need to lie down and rest before I can even sit at a desk, . . . how am I supposed to function and do my job under

> these conditions? I know how bad I feel now just standing and walking within my house and what I really fear is that I am going to become a completely bedridden individual if I am forced to travel and go back to work where they cannot accommodate my need for periodic breaks to lie down during the day.
>
> . . .[I]t seems that only the Postal Doctor got it right when she recommended disability based on the commuting factors and the inability of the Postal Service to accommodate my condition. . . . [3](See Exhibit D.)

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[3] This refers to a form completed by a Postal Service doctor in support of plaintiff's application, dated March 17, 1993. Under the heading "Reason for Non-Reassignment or Non-Selection," the doctor wrote:

> Mr. Faconti is suffering from neck and back pain due to a [motor vehicle accident] on March 29, 1992. . . . Conservative treatment allowed him to return to limited duty but commuting causes him a lot of pain. Since further accommodations cannot be made I recommend disability retirement.

> [I]f I say I cannot perform my job anymore, I do not want to be put in a position where I have to come back to work and prove it by having my condition deteriorate further (in fact, I have already tried that and my condition got worse). The only way I could perform for the Postal Service is if they place a computer and modem in my house and allow me to work from home.

(Exhibit A; Id. ¶¶ 87-88; Exh. DX68, at 6046.) Faconti's application for reconsideration was successful, and he began receiving CSRA annuity payments in January 1994. (USPS Undisputed Facts ¶ 89.)

In November 1993, Faconti also applied for a period of disability and disability insurance benefits under Title II of the Social Security Act and for SSI and Medicare eligibility under Title XVI of the Social Security Act. (Id. ¶¶ 97-110.) In that application, Faconti stated:

> I cannot stand or walk for more than 10 minutes without severe lower back pain. Riding in vehicles for more than 10-15 minutes also causes additional

> lower back pain. I require periodic breaks throughout the day to lie down and rest.

(Id. ¶ 100.) The Social Security Administration ("SSA") initially denied Faconti's application for benefits, and he sought reconsideration, stating:

> In January 1993, when it became apparent that I would not be able to return to work, I applied for a disability retirement. . . . Basically, my condition is such that I cannot stand or walk for any period of time beyond at most ten minutes without a band of severe and chronic lower back pain. . . . There is no way that I was physically or mentally able to work while I was pending a disability retirement reconsideration from OPM or until such a reconsideration determination was made, and there is no way any prospective employer would hire me for my specialized computer skills when even I did not know my work status or future availability.

(Id. ¶¶ 109-11.) The SSA eventually issued a decision finding Faconti disabled within the meaning of Title XVI (id. ¶ 111-14), and finding his "statements regarding symptoms, functional limitations and restricted activities to be fully credible." (Id. ¶¶ 111-12.) Faconti never actually received SSI benefits because he could not meet the needs-based financial requirements of that program. (Faconti Depo. at 180-81.) He did, however, obtain Medicare eligibility as a result of the SSA's finding that he was disabled. (Id.)

In approximately April 1993, while his disability retirement application was still pending, Faconti brought a personal injury case in state court arising out of the automobile accident that caused his injury. In that action Faconti testified, both in a deposition and in written discovery, that he was unable "to sit, stand, walk, or drive for even short periods of time" and was therefore incapacitated from working. (USPS Undisputed Facts ¶¶ 134-38, 147-49.) One of his two expert witnesses in that case, Dr. Pace, stated in his expert medical report, dated September 2, 1992, that because of Faconti's injuries "it is not recommended that he continues in his present line of work, even at a restricted level at this time." (Id. ¶¶ 139-41.) His other expert witness, vocational rehabilitation specialist David B. Stein, Ph.D., stated in a report dated April 12, 1996: "Mr. Faconti is not gainfully employable, since he can no longer sustain work performance in any job, even at the sedentary level." (Id. ¶¶ 142-46.) Dr. Stein further stated, in a separate report, that "Faconti does not retain the functional physical capacity to perform and sustain work, either in his usual occupation or in

alternative jobs." (Id. ¶ 145.) That action eventually ended in a settlement. (Faconti Depo. at 35-36.)

On May 28, 1993, Faconti provided USPS with a note from Dr. Pace stating that his condition was unchanged and that he "continues to be disabled and cannot perform in a postal service work environment." (USPS Undisputed Facts ¶¶ 132-33.) In June 1993, still during the pendency of his disability retirement application, the Postal Service offered Faconti the position of Supervisor of Distribution Operations at the Brooklyn Processing and Distribution Center ("PDC"), which he declined because he did not believe he was physically able to perform the duties of the position. (USPS Undisputed Facts ¶¶ 116-18.) He stated:

> . . . Unfortunately, as you know, I have put in for a disability retirement due to my condition stemming from a car accident in March 1992. . . . My most recent medical update indicates that there is no change in my condition (herniated disc L5 S1). As such I do not feel I am able to perform in such a position. . . .

(Id. ¶ 118, Exhibit 41.). The agency then involuntarily reassigned Faconti to a Mail Flow Controller position at the PDC, but he refused to report for that job, claiming that he was physically unable to perform the functions of that position. (Id. ¶¶ 120-23; Faconti Depo. at 193-94).

In his complaint in the 1998 action, Faconti alleges that when USPS decided in March 1993 not to select him for the OSS position, its decision was motivated by unlawful discrimination against him on account of his disability. Discovery in that action is complete, and the parties have filed cross-motions for summary judgment. The gravamen of Faconti's complaint in the 2001 action is that the Postal Service violated the Rehabilitation Act by failing to find and provide him with a reasonable accommodation for his disability. The 2001 action is based on essentially the same set of underlying facts as the 1998 action.

DISCUSSION

Summary judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and decide only whether there is any genuine issue to be tried. Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (2d Cir. 1988). A genuine factual issue exists if, taking into account the burdens of production and proof that would be required at trial, there is sufficient evidence favoring the non-movant such that a reasonable jury could return a verdict in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The burden of establishing that no genuine factual dispute exists rests on the party seeking summary judgment. Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 36 (2d Cir. 1994). This burden "may be discharged by

'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in the pleadings or briefs, but must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. Anderson, 477 U.S. at 256.

Prima Facie Claim Under the Rehabilitation Act

Faconti has sued the Postal Service under the Rehabilitation Act, a federal law that prohibits discrimination against employees with disabilities in federally-funded programs. As a full-time federal employee, it is undisputed that Faconti was covered by this law, which uses essentially the same standards as the American with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) (the "ADA"), the statute that prohibits discrimination against ordinary citizens with disabilities who are employed by enterprises affecting interstate commerce. See Wallace v. Social Sec. Admin., 108 F. Supp. 2d 716 (S.D. Tex. 2000). A plaintiff bringing a discrimination claim under the Rehabilitation Act has the burden of proving three elements: (1) the employee has a disability; (2) the employee is "otherwise qualified" to do the work, meaning that the employee could perform the essential functions of the job with or without reasonable accommodation; and (3) the employee is being excluded from a job that he or she holds or desires solely because of

his or her disability. See 29 U.S.C. § 794(d); see also Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 149-50 (2d Cir. 1998); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 383 (2d Cir. 1996). A discrimination claim may also
arise from proof of an employer's failure to provide reasonable accommodations to a qualified individual with a disability. See 42 U.S.C. § 12112(b)(5).[4]42 U.S.C. § 12112(b)(5).

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[4] This section of the ADA, on which the Rehabilitation Act relies, defines discrimination as including:

> (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

It is undisputed for purposes of the pending motions that plaintiff is an individual with a disability as defined by the Rehabilitation Act, *i.e.*, that he has a physical impairment that substantially limits one or more of his major life activities. See 29 U.S.C. § 705(9)(B); Wernick, 91 F.3d at 393. The primary issue in dispute is whether plaintiff is an

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(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

"otherwise qualified individual with a disability," meaning that he is able to perform the essential functions[5] Id.

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[5] The term "essential functions" is not defined in the Rehabilitation Act but is generally defined in Equal Employment Opportunity Commission ("EEOC") regulations to mean the "fundamental" duties to be performed in the position in question, but not functions that are merely "marginal." Stone v. City of Mount Vernon, 118 F.3d 92, 96 (2d Cir. 1997) (citing 29 C.F.R. § 1630.2(n)(1) (1996)). The regulations also provide illustrations of the reasons that a given function may be found to be fundamental to the position and examples of evidence that may be considered in making that finding:

Essential functions–

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

1. The function may be essential because the reason the position exists is to perform that function;
(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
(3) Evidence of whether a particular function is essential includes, but is not limited to:
I. The employer's judgment as to which functions are essential;
II. Written job descriptions prepared before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;

(quoting 29 C.F.R. § 1630.2(n)). of a position he holds or desires, with no more than a reasonable accommodation. See 29 U.S.C. § 794.[6] The plaintiff bears the burdens of production and persuasion on this point. Borkowski v.Valley Cent. Sch. Dist., 63 F.3d 131, 137 (2d Cir. 1995) Defendant argues that plaintiff is judicially estopped from asserting that he is an "otherwise qualified" individual because he claimed in his successful application for disability retirement benefits that he was totally disabled and unable to work, even with accommodation. This compels a brief discussion of the requirements for obtaining disability retirement benefits and the doctrine of judicial estoppel.

Requirements for Obtaining
Disability Retirement
Under the Civil Service Retirement System ("CSRS")

(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.

[6] The Rehabilitation Act does not itself contain a definition of "qualified individual with a disability," but instead refers the court to the ADA for a definition of that term. The ADA, in turn, defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The requirements for obtaining disability retirement under the CSRS are set forth in 5 U.S.C. § 8337 (2000) and its associated regulations at 5 C.F.R. §§ 831.1201 - 831.1206 (2001). The relevant statutory provision states:

> An employee who completes 5 years of civilian service and has become disabled shall be retired on the employee's own application or on application by the employee's agency. *Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.* For the purpose of the preceding sentence, an employee of the United States Postal Service shall not be considered

> qualified for a reassignment described in that sentence if the reassignment is to a position in a different craft or is inconsistent with the terms of a collective bargaining agreement covering the employee.

5 U.S.C. § 8337 (emphasis added). The Officer of Personnel Management's regulations define "useful and efficient service" as "(1) acceptable performance of the critical or essential elements of the position; and (2) satisfactory conduct and attendance." 5 C.F.R. § 831.1202. See also Wallace, 108 F. Supp. 2d at 718-19 (an applicant for civil service disability retirement "cannot work successfully if she cannot perform acceptably the essential elements of the job with satisfactory attendance"). OPM's regulations go on to provide that in order for an employee to obtain disability retirement under the CSRS, the employee must "have become disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no actual service deficiency, the disabling medical condition must be incompatible with either useful or efficient service or retention in the position." 5 C.F.R. § 831.1203(a)(4).

Moreover, "*the employing agency must be unable to accommodate the disabling medical condition in the position held or in an existing vacant position.*" 5 C.F.R. § 831.1203(a)(4) (emphasis added). "Accommodation" is defined as "an adjustment made to an employee's job or

work environment that enables the employee to perform the duties of the position." 5 C.F.R. § 831.1202. The regulation gives the following examples of "reasonable accommodation": "modifying the worksite; adjusting the work schedule; obtaining or modifying equipment or devices; providing interpreters, readers, or personal assistants; and reassigning or retaining the employee." Id. These are identical to the examples of reasonable accommodation given in the ADA. See 42 U.S.C. § 12111(9). Thus, an employee applying for CSRS disability retirement must obtain from his or her employer, and submit as part of the disability retirement application, sworn statements swearing to the fact that no accommodation is available for the employee's medical condition, either in the employee's own position or in any existing vacant position. 5 C.F.R. § 831.1206(a)(1)(ii), (iii).

In order to qualify for disability retirement benefits, a federal employee must prove entitlement to such benefits by a preponderance of the evidence. Wakley v. Office of Personnel Mgmt., No. 01-3183, 2001 WL 1181771, at *1 (Fed. Cir. Oct. 4, 2001), cert. denied, 122 S. Ct. 1919 (2002). The applicant must prove that he or she is disabled for useful and efficient service in the position he or she last occupied (5 C.F.R. § 844.103(a)(2) (2001)), that accommodation in that position would be unreasonable, and that he or she is not qualified for reassignment to a vacant position at the same grade or level in which he or she would be able to perform useful and efficient service. 5 U.S.C. § 8451(a)(2) (2000); 5 U.S.C. § 8337; Wakley, 2001 WL 1191771, at *1. In other words, by applying for retirement disability, the employee is stating under oath that (1) he or

she is unable, because of a medical condition, to perform the essential functions of his or her position or of an existing, vacant position in the agency, and (2) *no reasonable accommodation can change this circumstance*.[7]

Judicial Estoppel

Simply put, the doctrine of judicial estoppel bars a party from asserting a factual position in a legal proceeding that is contrary to a position that the same party has taken in a prior proceeding. See Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993); Young v. United States Dep't of Justice, 882 F.2d 633, 639-40 (2d Cir. 1989). The requirements for judicial estoppel are as follows: "first, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner." Bates, 997 F.2d 1037. In Simon v. Safelite Glass Corp., 128 F.3d 68, 71-74

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[7] In addition, a CSRS disability retirement annuitant must have his or her medical condition examined by OPM at least once a year. 5 U.S.C. § 8337(c). If the examination shows that the annuitant has recovered from his or her disability, then the annuity payments cease one year after the medical examination or upon re-employment by the government, whichever is earlier. 5 U.S.C. § 8337(d). This period is shortened to 180 days if the annuitant's earning capacity is restored to the point where he or she is earning eighty percent of the rate of pay of the position he or she occupied at the time of retirement. Id.

(2d Cir. 1997), the Second Circuit elaborated on the doctrine by explaining that judicial estoppel can apply to sworn statements made in prior administrative, as well as judicial, proceedings. See also Mitchell v. Washingtonville Central Sch. Dist., 190 F.3d 1 (2d Cir. 1999).

Application to Faconti's Case

As explained above, in order to obtain the CSRS disability retirement annuity he sought, Faconti had the burden of establishing that his condition made him incapable, *even with accommodation*, of performing the essential elements of his position or any other vacant, funded position in the agency. 5 C.F.R. § 831.1203(a)(4). The OPM found that Faconti had met that burden and had established his total incapacity to perform his job.

As an initial matter, it is undisputed that Faconti was absent from work for the month of May 1992 and was out on leave again after August 14, 1992. (USPS Undisputed Facts ¶¶ 16-18, 39-40.) As of January 1993, when he applied for the OSS position, Faconti still had not returned to work, and his doctor had stated that he expected Faconti's absence to last at least an additional six months. (Id.) Dr. Pace's January 5, 1993 report stated that "it would take a minimum of six months from the present, *if at all*" for Faconti to "sufficiently recover" to the point where he could commute to work and stand and walk to the extent required for his job. (USPS Undisputed Facts ¶¶ 82-85) (emphasis added).

It is well established that an individual who cannot report to work on a regular basis cannot perform the essential functions of a job, with or without reasonable accommodation. An "essential function of any government job is an ability to appear for work . . . and to complete assigned tasks within a reasonable period of time." Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994). Thus, courts have consistently held that regular attendance at work is an essential function of almost any job and that plaintiffs who cannot report to work regularly are not "otherwise qualified" for their jobs. See, e.g., Nowak v. St. Rita High Sch., 142 F.3d 999, 1002-03 (7th Cir. 1998) (plaintiff failed to demonstrate that he was a qualified individual with a disability given undisputed evidence that he failed to meet attendance requirements for his position); Tyndall v. National Ed. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) ("In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis" and an individual who "cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA"); Carr, 23 F.3d at 529 ("coming to work regularly" is an "essential function"); Mazza v. Bratton, 108 F. Supp. 2d 167, 175 (E.D.N.Y. 2000) ("an individual is not qualified for his position if he is unable to come to work"), aff'd mem., 9 Fed.Appx. 36, 2001 WL 363513 (2d Cir. Apr. 11, 2001), cert. denied, 122 S. Ct. 199 (2001); Bobrowsky v. New York City Bd. of Educ., No. 97 CV 874, 1999 WL 737919, at *4 (E.D.N.Y. Sept. 16, 1999) ("'an employee cannot be considered otherwise qualified when she is unable to report to work at the time required, because she

is not able to perform the essential functions of her job'") (quoting Davis v. Bowes, No. 95 Civ. 4765, 1997 WL 655935, at *16 (S.D.N.Y. Oct. 20, 1997)), aff'd mem., 213 F.3d 625 (2d Cir. 2000); Kotlowki v. Eastman Kodak Co., 922 F. Supp. 790, 798 (W.D.N.Y. 1996) ("The ADA does not require an employer to accommodate an employee who cannot get to work").[8]

Although there are no doubt unusual cases where an employee can effectively perform all essential work-related duties from home, Faconti does not allege or submit evidence to prove that he could have performed the essential elements of the OSS position without regularly attending work at the GMF.[9] Even in his deposition in the 1998 case, Faconti conceded his inability to appear for and fulfill the requirements of that job. (See Faconti Depo. at

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[8] While medical leaves of absence can sometimes be a form of accommodation under the Rehabilitation Act, an employer is not required "to hold an injured employee's position open indefinitely while the employee attempts to recover. . . ." Parker v. Columbia Pictures Indus., 204 F.3d 326, 338 (2d Cir. 2000).

[9] Although plaintiff stated in his disability retirement application that "[t]he best accommodation that could be made would be to allow me to perform computer related activities from home via modem," he did not state that he believed he could perform the functions of the *OSS position* from home.

141 ("I just know I was not able at that time, because of the physical limitations and the circumstances at the new facility, to return to work at the time that I filed for the disability retirement"). Nor anywhere in his voluminous submissions does he identify a specific, vacant Postal Service position that he believes he could have performed from home. As described above in detail, Faconti made numerous factual statements in his applications to the OPM and the SSA, and in his requests for reconsideration, that represented under oath that he was not physically capable of performing his position, or any other position within the Postal Service, with or without accommodation.

As defendant points out, the requirements for obtaining a CSRS disability retirement annuity are wholly inconsistent with the requirements for proving a claim of disability discrimination under the Rehabilitation Act. To prove his non-selection claim under the Rehabilitation Act, Faconti would have to prove that he was capable of performing the essential functions of the OSS position, with no accommodation or with a reasonable accommodation. See Bates, 997 F.2d at 1035. This cannot be reconciled with the CSRS, which requires an applicant to prove that *no* reasonable accommodation is available that would allow him to perform the essential functions of the job. That is why numerous courts have held that a plaintiff who requests and receives disability retirement benefits, based on the representation that he or she cannot work even with reasonable accommodation, is judicially estopped from bringing a claim for disability discrimination. See, e.g., Wallace, 108 F. Supp. 2d at 719 (Rehabilitation Act plaintiff, who had applied for and received CSRS benefits, was

precluded from bringing discrimination claim because her acceptance of the benefits determined conclusively that she was not "otherwise qualified"); Peoples v. City of Salina, Kansas, No. 88-4280-S, 1990 WL 47436, at *4 (D. Kan. Mar. 20, 1990) (plaintiff was estopped from contending that he was qualified for firefighter job under the Rehabilitation Act since he had previously contended that he was completely and permanently disabled from further employment as a firefighter and had been found entitled to receive disability benefits). See also Feldman v. American Memorial Life Ins. Co., 196 F.3d 783, 788, 791 (7th Cir. 1999) (granting summary judgment on judicial estoppel grounds against ADA plaintiff who had told the SSA in a previous successful Social Security Disability Insurance Benefits ("SS-DIB") proceeding that she was "completely and totally disabled and cannot perform any substantial gainful employment," could "barely move," and could not "work a six to eight hour day" because of pain, stiffness and fatigue); Mitchell, 190 F.3d at 4 (plaintiff who had represented to the SSA that "he could stand for only five minutes at a time and that he could not carry any weight," and that he did not believe a sedentary position would be available to him, was judicially estopped from bringing ADA

claim).[10] Cleveland is distinguishable from this case because, as explained above, (a) Faconti made numerous

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[10] As defendant explains, Cleveland v. Policy Mgmt. Sys., Inc., 526 U.S. 795 (1999), does not counsel a different result. The plaintiff in Cleveland had sought and obtained disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401, *et seq.*, after suffering a stroke and losing her job. She had represented to the SSA that she was "disabled" and "unable to work due to my disability" and, accepting those representations as true, the SSA had awarded her benefits. Id. at 799. While that application was pending, the plaintiff had also filed suit against her employer under the ADA, alleging that her employer had terminated her without reasonably accommodating her disability. Id. Applying the doctrine of judicial estoppel, the district court granted the employer's motion for summary judgment, and the Fifth Circuit affirmed, holding that "the application for or receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability." Cleveland v. Policy Mgmt. Sys., Inc., 120 F.3d 513, 518-19 (5th Cir. 1997), vacated and remanded, 526 U.S. 795.

The Supreme Court vacated and remanded for further proceedings, holding that a person who successfully applies for and receives SS-DIB cannot be judicially estopped from suing for

discrimination under the ADA *based solely on the prior application.* Cleveland, 526 U.S. at 802-03. Rather, the ADA plaintiff must be given an opportunity to "proffer a sufficient explanation" for the "apparent inconsistency" between the SS-DIB total disability claim and the ADA claim., *i.e.*, to explain how she could be disabled for purposes of receiving Social Security disability benefits yet still be able to perform the essential functions of her job, with or without reasonable accommodation. Id. at 807. In other words, since it is possible to reconcile and meet the requirements for both SS-DIB (which does not require the employee to prove that there is no reasonable accommodation available) *and* an ADA claim, and since the plaintiff's earlier statement to the SSA was nothing more than a bare-bones statement to the effect that she was eligible to receive Social Security disability benefits, her ADA claim could not automatically be barred by the prior application. Id. at 804.

The Court emphasized, however, that its holding would *not* apply to directly contradictory factual statements made in an earlier application. Id. at 802, 805, 807. Accordingly, a plaintiff will still be judicially estopped from disavowing or contradicting specific factual statements made in an earlier proceeding, such as "The light was red/green" or "I can/cannot raise my arm above my head." Id. at 802. Thus, in this case, Faconti is estopped from asserting that he was capable

specific factual statements in his application for disability retirement, which estop him from making contradictory statements now, and (b) unlike claims under the Social Security Act and the ADA, a claim for CSRS disability retirement cannot be reconciled with a claim under the Rehabilitation Act, since the requirements for each are mutually exclusive. Moreover, even if Cleveland did apply here, plaintiff has not provided an explanation sufficient to warrant a reasonable juror finding that, despite his numerous statements that he was unable to work, Faconti could nonetheless perform the essential functions of his job, with or without reasonable accommodation. See Cleveland, 526 U.S. at 807. In short, a person who successfully applies for a CSRS disability retirement annuity cannot, by definition, be a "qualified individual with a disability" under the Rehabilitation Act. And, even if that were not the case, the specific factual statements Faconti made in his OPM and SSA proceedings, which were adopted by those two tribunals, simply contradict the notion that he could have performed the essential functions of the OSS job or any other identified vacant USPS position.

Reasonable Accommodation

In neither of his two cases does Faconti assert that there was any reasonable accommodation (such as modifying the worksite, adjusting the work schedule,

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of performing work that required him to stand or walk, since it is plain that he "argued an inconsistent position in a prior proceeding." Bates, 997 F.2d at 1038.

obtaining or modifying equipment or devices, or providing a personal assistant) that would have allowed him to perform the essential elements of the OSS position, or any other specific vacant position, at the GMF. Rather, he contends in the 2001 case, and argues in his cross-motion for partial summary judgment in the 1998 case, that the Postal Service should have accommodated him by offering him the opportunity to work from home by modem, from remote via the New York Satellite Video Facility, or at a local post office near his home.

Although he never made any of these requests to anyone in his chain of command, the essence of Faconti's argument is that the Postal Service had some obligation, when he applied to the OPM for disability retirement, to construe his application as a request for accommodations and take responsibility for determining whether there was a way of accommodating his disability. He argues that there was a reasonable accommodation available – namely, working from home or via "satellite video" or reassignment to a Station Manager position near his home – that would have allowed him to perform the essential functions of a position he desired, and that he referred to these possible accommodations in his disability retirement application.

To make out a *prima facie* claim of discriminatory failure to provide a reasonable accommodation, a plaintiff must prove that (1) the plaintiff is an individual with a disability; (2) with or without reasonable accommodation, the plaintiff could perform the essential functions of a position he or she holds or desires within the agency; (3) the employer had notice of the plaintiff's disability; and (5) the employer refused to provide the

reasonable accommodation. See Parker, 204 F.3d at 332; Mitchell, 190 F.3d at 6. Again, it is the employee's burden to establish each of these elements. Parker, 204 F.3d at 332. An agency is not required to create a light-duty position for the employee. See Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996). See also Rucker v. City of Philadelphia, Civ. A. No. 94-0364, 1995 WL 464312, at *3 (E.D. Pa. July 31, 1995) ("[T]he ADA does not mandate that the employer create a 'light duty' or new permanent position"), aff'd, 85 F.3d 612 (3d Cir. 1996). Nor must an employer modify or eliminate the essential functions of a job to accommodate an employee. Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 20 (1st Cir. 1998). See also Fedro v. Reno, 21 F.3d 1391, 1395 (7th Cir. 1994) ("the Rehabilitation Act has never been interpreted to require an employer to create alternative employment opportunities for a handicapped employee, or to mandate preferential treatment of an employee simply because he is handicapped"); Gilbert, 949 F.2d 637, 642 (2d Cir. 1991) (reasonable accommodation "does not mean elimination of any of the job's essential functions").

When an employee cannot perform the essential functions of his or her position even with reasonable accommodation, "'*the employee* has a duty to identify a vacant, funded position whose essential functions he is capable of performing.'" Jackan v. New York State Dep't of Labor, 205 F.3d 562 (2d Cir.) (quoting Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997)) (emphasis added), cert. denied, 531 U.S. 931 (2000). See also Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999) ("[T]he duty to provide a reasonable accommodation is not triggered until a specific demand for an accommodation has

been made"); Taylor v. Principal Financial Group, 93 F.3d 155, 165 (5th Cir. 1996) ("If the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one"); Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1183 (6th Cir. 1996) (ADA plaintiff "bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable"); Felix v. New York City Transit Auth., 154 F. Supp. 2d 640, 657 (S.D.N.Y. 2001) ("the initial burden of requesting an accommodation is on the employee"); Mazza v. Bratton, 108 F. Supp. 2d 167, 176 (E.D.N.Y. 2000) ("A claim of disability discrimination. . . based on failure to accommodate is not made out under the ADA unless the employee's request for a reasonable accommodation has been denied by the employer"), aff'd, No. 00-9146, 2001 WL 363513 (2d Cir. Apr. 11, 2001), cert. denied, 122 S. Ct. 199 (2001). The employee must request the reasonable accommodation while still on the job. See Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 847-48 (8th Cir.), cert. denied, 528 U.S. 1050 (1999); Adams v. Rochester Gen. Hosp., 977 F. Supp. 226, 235 (W.D.N.Y. 1997); see also Fussell v. Georgia Ports Authority, 906 F. Supp. 1561, 1570 (S.D. Ga. 1995) ("it is simply too late to raise suggested accommodations two years later in a summary judgment response brief"), aff'd mem., 106 F.3d 417 (11th Cir. 1997). "If it turns out there is no job which the worker (with or without accommodation) is capable of performing, then the [employer] cannot be held liable for an ADA or Rehabilitation Act violation." Mengine, 114 F.3d at 420.[11]

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[11] A few courts have stated in dicta that, while it is generally true that an

employee's failure expressly to request a reasonable accommodation relieves an employer of liability for not providing one, "[a]pplication of this general rule is not warranted . . . where the disability is obvious or otherwise known to the employer without notice from the employee." Felix v. New York City Transit Auth., 154 F. Supp.2d 640, 657 (S.D.N.Y. 2001). See also Glozman v. Retail, Wholesale & Chain Store Food Employees Union, Local 338, No. 00 CIV. 9781, 2002 WL 727020, at *7 (S.D.N.Y. Apr. 24, 2002). Here, the Postal Service does not deny that Faconti's disability was obvious and known to it. However, even assuming that this proposition represents controlling law, it does not relieve Rehabilitation Act plaintiffs of the burden of proving that there was a vacant position available, the essential functions of which the plaintiff could perform. Mengine, 114 F.3d at 420. On a motion for summary judgment, the plaintiff cannot meet that burden with "[s]tatements that are devoid of any specifics, but replete with conclusions. . . ." Bickerstaff v. Vassar College, 196 F.3d 435, 452 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000). Moreover, as explained, Faconti removed himself from the category of employees who are entitled to reasonable accommodations by successfully applying for CSRS disability retirement and thereby meeting his burden of proving that no such reasonable accommodation existed.

Here, plaintiff does not allege, much less provide evidence to show, that he ever proposed the accommodations he now seeks directly to anyone in USPS management for consideration. To the contrary, he conceded in his deposition that he did not. (Faconti Depo. At 161-63.)[12](Faconti Depo. at 161-163). Nor does he claim or

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[12] Q. Before you submitted this [disability retirement application] to the postal service on January 19th of '93, had you ever, at any point in time, communicated to Peter Baylis [Faconti's supervisor] or anyone else in the postal service a request or a desire that you be allowed to perform computer-related activities from home via modem. . . ?

(i) I am trying to think if I had ever mentioned it specifically. No, I don't think I did.

* * *

10 Did you communicate to Peter Baylis or anyone else within your immediate work area, who would be anyone who would be in a position to make modifications to the terms of your position, that you wanted to be allowed to conduct the essential functions of your job from the New York Satellite

demonstrate that his supervisors had any personal knowledge of the contents of his retirement application, or that he attempted to engage the Postal Service in any kind of interactive process regarding a possible accommodation. While USPS management knew plaintiff was seeking disability retirement, the application was submitted to the USPS human resources department and then processed outside the agency by the OPM. (USPS Undisputed Facts ¶¶ 20-26.) Thus, Faconti did not bring a request for

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Video Facility or to use that facility to assist you in conducting those functions?

(i) I didn't think that was appropriate. I really didn't. . . .

* * *

(i) Now, prior to submitting that application for disability retirement to the postal service, did you ever communicate to anyone at the postal service that you would be interested in taking a position as a station manager in zip codes 11204 or 11209 prior to submitting this?

1. No, I hadn't.

accommodations to anyone in a position to arrange for them.[13]

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[13] Faconti makes much of a handwritten note by a doctor in the Postal Service Medical Unit who evaluated his disability retirement application and posed the question: "Could he be transferred to a station near his home? I am not sure that he cannot perform a light duty assignment." The note was attached to a transmittal memorandum to Faconti from the person in the USPS human resources department who was responsible for processing his CSRS disability retirement application and determining whether or not to recommend its approval to OPM. (See Exhibit C). It appears to have been sent to Faconti for the purpose of alerting him to the possibility that the human resources department might recommend to OPM that it deny Faconti's application. Regardless, the doctor's note does not establish that a light duty assignment at a station near Faconti's home was available. Indeed, in his request for reconsideration of the OPM's initial denial of his application, Faconti rejected the doctor's suggestion and argued that there was no such position that would meet his needs. He wrote: "As to a managerial position at a local station, in essence *there is no such position where I would be able to sit at a desk all day with minimal standing or walking*. . . ." (USPS Undisputed Facts ¶ 88b) (emphasis added).

In his application for disability benefits Faconti stated:

> . . .The best accommodation that could be made would be to allow me to perform computer related activities from home via modem. This would allow me to work as long as my condition allowed, take a rest and go back to work, then rest and avoid the daily grind of traveling that is the biggest obstacle of my returning to work. . . . Another possible alternative would be to place me as a Station Manager at a Station that is within walking distance or a very short ride from my home. . . .

(USPS Undisputed Facts ¶ 78.) This is the only formal statement about possible accommodations that Faconti made prior to March 1993. (Id. ¶ 96.) However, this statement, made in this context (*i.e.*, where Faconti had the burden of establishing that no reasonable accommodation existed) could fairly be, and apparently was, interpreted as meaning that he did not consider working from home or at a post office near his home to be feasible options. Indeed, in his request for reconsideration, Faconti acknowledged "the inability of the Postal Service to accommodate my condition." (Id. ¶ 88).

Certainly, plaintiff does not put forth evidence to show that it would have been possible for him to perform the essential functions of the OSS position from home via modem or with use of the New York City Satellite Video Facility,[14] or that any Station Manager position near his home

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[14] In fact, Faconti has repeatedly refuted the notion that he could have performed the essential functions of either the POOF position or the OSS position from home or from a remote location. Faconti testified that, during the time he served as POOF at the GMF, his work required him to sit at a computer for sustained periods of time doing computer analyses and writing reports, and that he was frequently required to walk and stand for long periods of time to accomplish other activities related to his job. (Faconti Depo. at 18-24.) He was also required to travel frequently to attend various meetings and conduct station surveys at various postal stations. (Id. at 18-22, 24-25.) Likewise, the official job description for the OSS position requires the employee in that position to, *inter alia*, conduct and participate in operational studies and surveys; determine requirements for new facilities equipment and operational staffing; initiate and coordinate improvements in staffing and equipment utilization, production control, and operational procedures; monitor implementation of quality improvement and corrective action plans; monitor implementation of new programs and ensure that methods, standards, and procedures are within established specifications; and meet

was vacant and available at the times relevant to these

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with equipment manufacturers, suppliers, and contractors relative to systems installation, operation, and maintenance. (USPS Undisputed Facts ¶61, Ex. DH.) Faconti conceded in his deposition that a requirement of the OSS position was commuting to the Forbell Street facility in Brooklyn, where the position was situated (Faconti Depo. at 111), and when he applied for the OSS position, he did not indicate anywhere in his application or vacancy preference form that, in order for him to be able to perform the essential functions of the job for which he was applying, he would require some accommodations. (Id. at 108-109, 111, 115-116.) He most certainly did not say that he wanted or needed to perform the functions of the OSS position from home. The statements Faconti and Dr. Pace made in support of Faconti's application for disability retirement totally contradict the notion that plaintiff was physically capable of commuting to work or that he could have performed the essential functions of the OSS position. Nor, given the requirements of the OSS position, would a reasonable jury find that Faconti could have performed the essential functions of the job from home or from a remote location.

cases.[15] Nor has he ever applied for any Station Manager positions (Exhs. DX18; DX19; Faconti Depo at 159, 161, 163) or identified any classified, graded position in the Postal Service that would have allowed him to work from home or by remote via satellite video. At any rate, he testified at his deposition that he was not qualified for and was not interested in a Station Manager position at a post office near his home. (USPS Undisputed Facts ¶ 57; USPS Supp.

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[15] Plaintiff states conclusorily that there must have been vacant Station Manager positions near his home because the USPS was going through a reorganization and all new management positions were placed up for bid. However, he points to no actual vacant position that he believes he could have performed.

Undisputed Facts ¶ 6.)[16] And, not only did Faconti fail to identify or request a reasonable accommodation, he rejected

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[16] At his deposition, Faconti was shown a list of vacancies and asked why he did not apply for any of those positions. He testified:

> . . . I am not sure what that job is. I never saw a job description of it. . . . In the old frame work, they were nobody, a manager. If it is the same job, which I am not even sure it is, I don't know if that's at manager stations and branches, if that is the same job. I am not aware that was the same job.
>
> * * *
>
> . . . That was my facility. I got them into that facility. In essence, if I was to return to work, that was the facility that I really was going to be most familiar with.

I imagine there was a certain amount of anxiety not just for myself, aside from the physical situation I was in, but a concern with every manager when they had to put in for those new jobs, that they had to potentially face the possibility of going to a new place. I somehow felt with my physical situation that I didn't need to contemplate trying to learn a whole new operation in addition to my problem physically that I had to deal with.

* * *

There was a whole different set of people I did not know and a situation where I did not feel comfortable putting in for a job in a facility I wasn't familiar with, even though I may have been qualified.

(Faconti Depo. at 93-94.)

the alternative positions that the Postal Service did offer him, namely the positions of Supervisor of Distribution Operations and Mail Flow Controller at the PDC, without suggesting any accommodations that would have allowed him to perform those jobs. In short, Faconti has not met his burden of showing that he identified and requested a reasonable accommodation for his disability and that such a reasonable accommodation was in fact available.

Other Evidence

Additional facts in the record undermine Faconti's claim that he was a "qualified individual with a disability." For example, in his personal injury case arising from his automobile accident, Faconti gave sworn testimony and elicited expert testimony to prove that his disability prevented him from working *in any capacity*. In his verified bill of particulars in that case, dated August 30, 1993, Faconti stated that he "has been substantially confined to his home since the date of the accident aside from visits to medical care providers and futile attempts to return to work"; "plaintiff spends the majority of the time in his home either in an orthopedic chair or resting in bed"; and plaintiff "has been incapacitated from work since the accident aside from unsuccessful attempts to return to work." (USPS Undisputed Facts ¶¶ 134-38.) He also testified in an examination before trial in that case, on November 9, 1993, that since his March 29, 1992 accident he had been unable to walk or stand for more than ten or fifteen minutes. (Id. ¶¶ 147-48.) As

explained above, Dr. Pace opined in his expert report in that case that "it is not recommended that [Faconti] continues in his present line of work, even at a restricted level at this time." (Undisputed Facts ¶¶ 140-41.) And Dr. Stein, a vocational rehabilitation specialist, stated on plaintiff's behalf that:

> Mr. Faconti is not presently employable on a sustained competitive basis in the open labor market. . . [H]e has significant functional limitations; he is unable to engage in the only type of employment he has ever engaged in during his working life; and will have significant difficulty in procuring, performing, and sustaining any gainful employment at this time and continuing. . . . Mr. Faconti does not retain the functional capacity to perform and sustain work, either in his usual occupation or in alternative jobs.

(USPS Undisputed Facts ¶¶ 144-45.) Dr. Stein's supplemental report, prepared for Faconti's case, further opined that "Mr. Faconti is not gainfully employable, since he can no longer sustain work performance in any job, even at the sedentary level." (Id. ¶ 146.) Although these

statements do not implicate the doctrine of judicial estoppel, since the case resulted in a settlement and the court did not rely on or adopt these statements, they directly belie the claim that Faconti was capable of performing the essential functions of the OSS job, or any other vacant position in the Postal Service, even with reasonable accommodation.

Faconti also provided deposition testimony in the 1998 case that contradicts the notion that he was a "qualified individual." For example, Faconti concedes that one essential element of the OSS position, and the POOF position, would be to monitor the implementation of new programs and ensure that the methods, standards, procedures, equipment, and facilities operate within established specifications. (USPS Undisputed Facts ¶¶ 4, 61-62.) Yet he testified at his deposition that his condition completely prevented him from fulfilling this responsibility. (Faconti Depo. at 71-72.) He also testified that his condition prevented him from traveling to and from work to attend the meetings that were required as part of the OSS job. (Id.; Undisputed Facts ¶¶ 7, 28, 30-33, 35, 38.)

These statements, taken together with Faconti's previous statements and those of his doctor in his applications to the OPM and SSA, make it clear that no reasonable jury could find that plaintiff was a "qualified individual with a disability" at the time of his non-selection for the OSS position. In sum, plaintiff cannot meet the requirement of proving that he is a qualified individual with a disability under the Rehabilitation Act because (1) he does not allege or provide evidence to prove that he was physically capable of performing the essential functions of the job for which he applied, and he stated numerous times

under oath that he was not; (2) he does not allege or show that he ever identified to his superiors a vacant position the essential functions of which he was physically capable of performing, with or without reasonable accommodation; and (3) although he now argues that he was entitled to a reasonable accommodation, plaintiff (a) does not allege that he ever asked his superiors for a reasonable accommodation that would have allowed him to perform a position within the Postal Service, and (b) has failed to put forth evidence to show that the accommodations he now identifies – working from home, via "satellite video," or at a local station near his home -- were reasonable and available at the relevant times. Since no reasonable jury could find that plaintiff was an "otherwise qualified" individual under the Rehabilitation Act, defendant's motion for summary judgment in the 1998 case must be granted.

The 2001 Case

In his complaint in the 2001 case, plaintiff alleges that the USPS violated the Rehabilitation Act when it allegedly "support[ed his] request for disability retirement" on March 17, 1993, by completing – at his request – a form entitled "Agency Certification of Reassignment and Accommodation Efforts" in connection with Faconti's application for CSRS disability retirement. Faconti argues that between January 19, 1993, when he filed his disability retirement application, and March 17, 1993 the Postal Service "failed to exhaust all reasonable efforts to alleviate any service deficiencies through accommodation" before supporting his request for disability retirement. He further claims that USPS "failed to review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in

the commuting area, to determine if [he] met the minimum qualification standard for any vacant position." He states that he first became aware of this alleged violation on May 27, 1999 – nearly six years after he applied for CSRS disability retirement – when he read "the relevant pages of the Federal Personnel Manual, Supplement 830-1,[17] which made [him]

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[17] This section of the Federal Personnel Manual, annexed to plaintiff's moving papers as Exhibit J, states in relevant part:

> Federal policy regarding the employment of handicapped persons advocates that Federal agencies attempt to retain disabled employees by accommodating their disability. Therefore, the agency must exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement.
>
> * * *
>
> Reasonable accommodation obligations apply both to the

> employee's current position and to any vacant position to which the employee could be reassigned.
>
> * * *
>
> Thus, when an employee initiates an application for disability retirement, the employing agency must review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.

(See Exhibit J at 13-14.) As defendant points out, this obligation on the part of federal agencies to determine whether or not there are reasonable accommodations for an employee who has filed for disability retirement appears to exist in substantial part for the benefit of the government, not the employee. The obligation apparently exists to ensure that no employee who is not so entitled is given disability benefits. Regardless, this court is aware of no authority, and plaintiff has cited none, for the proposition that an agency's failure to comply with the policies or requirements of the Federal Personnel Manual creates a cause of action

realize the agency had discriminated against [him] and that [he] was, in essence, constructively discharged by the agency." (Complaint, dated Feb. 21, 2001 ("2001 Compl."), ¶ 8.)

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under the Rehabilitation Act. As explained above, a Rehabilitation Act plaintiff has the burden of identifying and requesting a reasonable accommodation; the agency is not required to construe a disability retirement application as a request for accommodation. See Mengine, 114 F.3d at 418 (""it falls to the employee to make at least a facial showing' that there were vacant, funded positions whose essential functions he was capable of performing"). To be sure, the Postal Service owed no duty *to plaintiff* to attempt to discredit or question the claims he made in his disability retirement application. Nor can plaintiff credibly argue that the statements he made in his application for disability retirement were "involuntary." To put it another way, plaintiff cannot bring suit against the Postal Service for agreeing with him.

Setting aside the issues of subject matter jurisdiction and failure to exhaust administrative remedies,[18] the 2001 action suffers from the same deficiencies as the 1998 action, namely plaintiff's inability to show that he is or was a "qualified individual with a disability" or that he ever identified or requested a reasonable accommodation in the manner contemplated by the Rehabilitation Act. As explained above, Faconti is judicially estopped – based on his

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[18] Defendant argues that, if plaintiff's complaint is construed as arguing that OPM should not have granted his application for disability retirement, then this court lacks subject matter jurisdiction over the claim, since only the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit have jurisdiction to review a grant or denial of an application for a CSRS disability retirement annuity. (See Mem. of Law in Support of Def's Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction, and for Failure to State a Claim Upon Which Relief May be Granted, or, In the Alternative for Summary Judgment, dated May 7, 2001, at 5-6.) Defendant further argues that Faconti has failed to exhaust his administrative remedies, as he failed to contact an EEO counselor within 45 days of the allegedly discriminatory event, as required by 29 C.F.R. § 1614.105(a)(1). (Id. at 6-12.) The court finds it unnecessary to address the merits of these arguments, since defendant's motion may be granted on the grounds stated above.

previous statements to the OPM and SSA – from claiming that he was capable of performing the essential functions of the position for which he applied. Moreover, USPS could not reasonably have been expected to interpret Faconti's application for disability retirement as a request for reasonable accommodations, since the application was not a "request" for accommodations but rather for a disability retirement annuity, and he has not demonstrated that the accommodations he identified in his application were reasonable or available. In view of Faconti's long and indefinite absence from work, his failure to identify – now or then – an available reasonable accommodation or a vacant position the essential functions of which he could have performed, this court finds summary judgment warranted in the 2001 action.

Conclusion

The court is sympathetic to plaintiff's situation, including the serious physical disabilities resulting from his automobile accident and the resulting blow to his career and personal finances. The court also recognizes the intelligence and long hours of hard work that went into the prosecution of these lawsuits and plaintiff's sincere personal conviction that he was treated unfairly by USPS. Unfortunately for plaintiff, the law does not support his position in these lawsuits. Having carefully reviewed all of plaintiff's submissions, the court finds that plaintiff has not presented evidence from which a reasonable jury could find that he was an "otherwise qualified" individual under the Rehabilitation Act, or that he met his burden of identifying and requesting a reasonable accommodation. The court is therefore compelled to grant defendant's motions for

summary judgment in both of these actions and deny Faconti's motion for partial summary judgment in 98 CV 0275.

SO ORDERED.

Dated: Brooklyn, New York
July 25, 2002

"S/_____"
ROBERT M. LEVY
United States Magistrate Judge

Frank P. Faconti, Appellant, v. William J. Henderson, Postmaster General, United States Postal Service, (Northeast/New York Metro), Agency

Hearing No. 160-97-8040X Appeal No. 01976463 Agency No. 1A-116-1031-94

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1999 EEOPUB LEXIS 612

February 5, 1999

ISSUEDBY: [*1] For the Commission by Ronnie Blumenthal, Director, Office of Federal Operations

OPINION:

DECISION

On August 22, 1997, Frank P. Faconti (appellant) timely appealed the final decision of the United States Postal Service (agency), dated July 31, 1997, concluding he had not been discriminated against in violation of the Rehabilitation Act of 1973, as amended, *29 U.S.C. § 791* et seq. In his complaint, appellant had alleged that officials at the agency's Brooklyn, New York, Plant & Distribution Center (P & DC)

discriminated against him on the basis of his physical disability (back injury) when he was not allowed to return to work while his application for disability retirement was pending. This appeal is accepted in accordance with the provisions of EEOC Order No. 960.001.

The record establishes that appellant was a long-time agency supervisor who worked in the In-Plant Support area as a computer expert (Postal Field Operations Officer, EAS-20). In March 1992, appellant sustained serious injuries in an automobile accident, resulting in a herniated spinal disk at L5 and S1. After a brief period of sick leave, appellant returned to work on March 31, 1992. [*2] From that date until May 4, 1992, appellant continued to work in his position, but testified that he suffered considerable pain in his back. n1 From May 5, 1992 through June 1, 1992, appellant was off work on approved sick leave due to the recommendations of his physicians that he needed bed rest. On June 2, 1993, appellant returned to work through approximately August 14, 1992. this time as the supervisor in charge of Tour 1. The work, however, exacerbated his back problems and he again went out on approved sick leave and never returned to work at the postal service.

During this same time period, the postal service was undergoing a nationwide reorganization which resulted in the elimination of virtually all supervisory positions and the

n1 There is no allegation that the agency failed to honor appellant's medical restrictions (limited periods of standing, lifting restrictions, and need for a special chair) when he returned to work.

creation of new management positions. All supervisors nationwide were required to apply [*3] for the new positions established as a result of the organizational change. On January 5, 1993, appellant, although still on sick leave, submitted an application for the position of Operations Support Specialist, EAS-20. On March 31, 1993, another applicant for the position was competitively selected over appellant. n2

Meanwhile, on January 19, 1993, appellant filed an application for disability retirement. While not completely clear from the record, it appears that the application was initially processed by the agency's personnel office and then forwarded outside the postal service to the Office of Personnel Management (OPM) for decision. [*4] In his retirement application, appellant represented that he was no longer physically able to perform in his assigned position and stated that his back condition also limited the other positions he might be reassigned to:

The same basic restrictions of activities imposed by my medical condition . . . make my ability to perform in other positions for which I may be qualified very limited. If I sit at

n2 Appellant filed an EEO complaint alleging his nonselection for this position was also the result of disability discrimination. The Commission upheld the agency's finding of no discrimination in this matter. See Faconti v. United States Postal Service, EEOC Appeal No. 01950308(May 9, 1996), request for reconsideration denied, EEOC Request No. 05960614 (December 12, 1997).

a computer I need to take periodic breaks to lie down and this will be difficult to accommodate. In addition, when pain intensifies, the painkiller medication I take makes it unadvisable to drive a car.

Appellant went on in his application to indicate that the agency had made efforts to accommodate his disability by restricting the standing and walking he was required to perform. However, despite these efforts, appellant said that his condition continued to worsen. He went on to state that:

The best accommodation that could be made would be to allow me to perform computer related activities from home via a modem. This would allow me to continue to work as long as my condition allowed, take a rest and go back to work, then rest and avoid the daily grind of traveling that is the [*5] highest obstacle to my returning to work. I know this sound unorthodox, but I have much to contribute and the technology is available to allow for such an arrangement (perhaps with the New York City Satellite Video Facility). Another possible alternative would be to place me as a Station Manager at a station that is within walking distance or a very short ride from my home (i.e. 11204, 11214, 11219).

Appellant testified that although he never made the request to work at home or close to his home to anyone in his chain of command, he believed that his application for disability retirement put the agency on notice that he was requesting such an accommodation. However, there is no evidence that

appellant's supervisors had any personal knowledge of the contents of his retirement application.

In March 1993, while on sick leave, appellant contacted his supervisor and asked if he could return to work for the next three to five days to assist a contractor in updating a computer software program. Appellant stated the supervisor denied his request and told him that because he had filed for disability retirement he was not permitted to work. The supervisor denied making such a statement. [*6] Rather, he said he told appellant that returning to work for a one-time project of such a short duration was not a practical option because, under agency regulations due to his long-term absence, appellant would need to provide medical documentation of his ability to work and any relevant medical restrictions required. The supervisor asserted that by the time such documentation was obtained, the work would be finished. n3

Appellant continued to remain on approved sick leave and waited for a decision on his disability retirement application. Other than the one attempt, there is no indication that appellant made any other efforts to return to work while his disability retirement application was pending.

n3 As it turned out, the contractor never actually did the work appellant proposed to assist with until the next year, after appellant had retired from the agency.

In June 1993, in an effort to place appellant within the newly reorganized management structure, the agency offered appellant the position of Supervisor of [*7] Distribution Operations, which he declined because he did not believe he was physically able to perform the duties of the position and added:

...Unfortunately, as you know, I have put in for a disability retirement due to my condition stemming from a car accident in March 1992...My most recent medical update indicates that there is no change in my condition (herniated disc L5 S1). As such I do not feel I am able to perform in such a position...

Appellant was subsequently assigned by the agency to a Mail Flow Coordinator position which he also protested he was physically unable to perform. Agency management said that the Mail Flow Coordinator position was selected as an accommodation to appellant's disability because it involved largely sedentary work, viewing television monitors in an automated control room to spot points where the mail was not flowing as designed. The job did not require appellant to personally fix a problem, but to coordinate with others to solve the backup. However, because appellant declined to accept the position, he was reassigned to his original position, that of Postal Field Operations Officer, although he never returned to actually work in this job.

[*8] In August 1993, appellant's application for disability retirement was denied by OPM. Appellant immediately appealed, and the initial denial was overturned. In January

1994, appellant retired from the agency with disability benefits.

On May 18, 1994, appellant filed a formal EEO complaint with the agency, alleging that the agency had discriminated against him by failing to grant his request to work on a project in March 1993 pending a decision on his disability retirement application. The agency initially rejected the complaint as untimely. This decision was reversed by the Commission, and the agency was ordered to process the complaint. Faconti v. United States Postal Service, EEOC Appeal No. 01950657 (June 23, 1995). In compliance, the agency accepted the complaint and conducted an investigation. At the conclusion of the investigation, appellant requested an administrative hearing before an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ).

On May 13, 1996, following a hearing at which three witnesses testified, the AJ issued a decision concluding that appellant had been discriminated against by the agency on the basis of his disability when he was "disallowed [*9] work" pending the approval of his disability retirement application. n4 As a remedy for the discrimination, the AJ recommended that appellant be awarded: (1) backpay for the

n4 A fair reading of the AJ's decision reveals that he expanded the issue in appellant's complaint beyond the denial of the short term project in March 1993, to include the entire time period between the date appellant filed his application for disability retirement (in which he mentioned his desire to work at home) and his actual retirement.

period of time between his filing of his application for disability retirement and his actual retirement; (2) that he be reimbursed for all expenses for medical treatment during that period (regardless of any payments by appellant's health insurance); (3) that he be reimbursed for any "pecuniary

expenses" incurred as a result of the discrimination; and (4) that appellant be paid the sum of $25,000 in non-pecuniary compensatory damages for "pain, suffering and psychological harm."

On July 31, 1997, the agency [*10] issued its final decision, rejecting the AJ's recommended decision, and entering a finding of no discrimination. It is from this decision that appellant now appeals.

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship on its operations. 29 C.F.R. § 1614.203(c). As an initial matter, the Commission finds that appellant is an individual with a disability as defined by the Rehabilitation Act. This fact is not disputed by the agency. Appellant must also show that he is a "qualified" individual with a disability. The agency has argued that appellant cannot be found to be "qualified" because he represented in his application for disability retirement that he was physically unable to perform the duties of his position with the postal service. However, it is the Commission's policy that because of fundamental differences between the Rehabilitation Act

and other disability benefits programs, representations made in connection with an application for disability benefits may be relevant to--but [*11] are never determinative of--whether a person is a "qualified" individual with a disability. See EEOC's "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA)", Notice No. 915.002 (February 12, 1997). In this case, it is undisputed that appellant, when he was able to work, was qualified to perform the functions of his position. It is critical to remember that the Rehabilitation Act's definition of "qualified" requires that an employee be able to perform the essential functions of the position at issue with or without reasonable accommodation. In this case, appellant asserts he would have been able to continue performing the essential functions of his position if the agency had accommodated his request to work at home or at a work site within walking distance of his home. Therefore, a premature finding that appellant was not qualified would unfairly cut off consideration of his claim that the agency failed to reasonably accommodate his disability which would have enabled him to perform the essential functions [*12] of his position. See Southerland v. United States Postal Service, EEOC Request No. 05930714 (July 15, 1994).

The dispositive issue in this case is whether the agency had sufficient information from which it should have provided appellant with the accommodation of either working at home or at a worksite within walking distance of his home while his application for disability retirement was pending. The AJ

agreed with appellant's assertion that the agency was provided such information in his application for disability retirement. The agency, on the other hand, argues, in essence, that it never understood exactly what accommodations appellant was requesting, and that it provided the best accommodations it could given its limited understanding of appellant's needs.

The Commission has held that the responsibility for fashioning an appropriate reasonable accommodation is shared between the employer and employee and is best determined through a flexible, interactive process. 29 C.F.R. Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans With Disabilities Act ("Guidance"), Section 1630.9. See also, Hupka v. Department of Defense, EEOC Appeal No. 02960003 [*13] (August 13, 1997). In this case, the evidence establishes that the agency and appellant did engage in an interactive process. Appellant presented the agency with letters from his doctors outlining his medical restrictions, and the agency accommodated those restrictions, providing appellant with light duty assignments, as well as approving extended periods of sick leave when appellant was in need of bed rest. In March 1993, the evidence shows that the agency and appellant engaged in a discussion over appellant's request that he be permitted to come in to work for two or three days to assist a contractor in updating a computer software program. n5

n5 With regard to this request, the Commission is persuaded by the agency's position that its denial of this request was not discriminatory because of the impracticality of obtaining appropriate medical releases to

Finally, the record is also clear that during the agency-wide reorganization, the agency and appellant went back and forth examining a variety of positions to which he could be assigned which would best accommodate his back condition.

[*14] However, it is equally as clear from the record that at some point the interactive process broke down. Appellant asserts that he expressed the need to work at home or at a location near his home in his application for disability retirement. However, he concedes that he never raised this option with his management. There is no indication in the record that any agency official in a position to consider such an accommodation was aware of the contents of appellant's application for disability retirement. While it is clear that management knew appellant was seeking a disability retirement, the application was processed outside the agency by the Office of Personnel Management. Applying the concepts of good faith and reasonable effort to the facts of this case, the Commission finds that the responsibility for the failure to isolate the specific accommodations appellant believed would have enabled him to continue working rests on appellant. Management could not even consider his request to work at home if he did not effectively communicate that request to them. This is not a case where appellant failed to specify a necessary accommodation because of a lack of knowledge. Instead, the record [*15]

work on such an immediate short-term project. Moreover, the Commission notes that this issue was rendered moot by the fact that the contractor never did the work appellant proposed to assist until the next year, long after appellant had retired from the agency.

indicates that appellant, in his own mind, was clear about what he needed and how it could be implemented. However, he failed to communicate that information to management for their consideration.

This failure to communicate led to the breakdown in the interactive process. Management was left to guess at what actions it should take and did so by attempting to assign appellant to a variety of positions, and appellant was left frustrated that his disability was seemingly not being accommodated. Liability for the failure to provide reasonable accommodations ensues only where the agency bears the responsibility for the breakdown. But where, as here, the agency did not obstruct the process, and instead made reasonable efforts both to communicate with appellant and provide accommodations based on the information it possessed, a violation of the Rehabilitation Act does not exist. See *Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996).*

Therefore, for the reasons stated above, and after careful consideration of the record, including the statements submitted by the parties on appeal, it is the decision of the Commission to AFFIRM [*16] the agency's final decision which concluded no discrimination had occurred.

STATEMENT OF RIGHTS – ON APPEAL
RECONSIDERATION (M0795)

The Commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a

written request containing arguments or evidence, which tend to establish that:

1 New and material evidence is available that was not readily available when the previous decision was issued; or

2 The previous decision involved an erroneous interpretation of law, regulation or Material fact, or misrepresentation of established policy; or

3 The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. . See 29 C.F.R. § 1614.604 (c).

RIGHT TO FILE A CIVIL ACTION (S0993)

It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, **YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE.** Failure to do so may result in the dismissal of your case in court. "Agency" or "department"

means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794 (c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

FEB-5 1999
DATE

"S/_____"
Ronnie Blumenthal, Director
Office of Federal Operations

UNITED STATES OF AMERICA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NEW YORK DISTRICT OFFICE

FRANK P. FACONTI,

Complainant,

-against-

MARVIN RUNYON, POSTMASTER GENERAL,

U.S. POSTAL SERVICE,

Agency-Respondent

EEOC Hearing No. 1A-116-1031-94

May 13, 1997

10:53 a.m.

B E F O R E:

DAVID E. LICHT, Administrative Judge

(Via Telephone)

TONI ANN IARROBINO, Hearing Reporter

Proceedings

JUDGE LICHT: I render my decision as follows:

All administrative requisites to a hearing as set forth in 29 C. F. R. Part 1614, were duly accomplished. The following Findings and Conclusions are made pursuant to 29 C. F. R. 109:

Pursuant to 29 C. F. R. 1614.109 a hearing was conducted on May 1, 1997 at the offices of the EEOC, 7 World Trade Center, New York, New York on the discrimination complaint filed by Frank P. Faconti a former employee at the Agency's Brooklyn, New York facility. He alleged that he was discriminated against on account of disability when in March 1993 he was not allowed to return to work because he had previously filed for disability retirement.

The following witnesses testified at the hearing: the Complainant, Mr. Faconti, Mr. Kan Yu and Mr. Greg Incontro.

JURISDICTION:

Jurisdiction to decide this case is predicated on the Rehabilitation Act of 1973, as amended in 1978 to extend the Federal employees, via Sec. 505 of the Act, the remedies, procedures and rights contained in Sec. 717 of the Civil Rights Act of 1964 and also by the Equal Employment Opportunity Act of 1972; and further amended by the American with Disabilities Act.

ISSUE:

Did the Agency discriminate against the Complainant on account of disability when in late March 1993 he was not allowed to return to work because he had previously filed for disability retirement?

Complainant Frank P. Faconti, a computer expert and long-time employee of the Agency sustained serious injuries in an off-the-job automobile accident in March 1992, resulting in a herniated disc. In March 1992 he returned to work and continued working for about a month, but suffered great pain and required bed rest. In June 1992 he again returned to work for a time; however again could not continue on account of his pain. During the time he was out he nevertheless produced a video for the agency entitled "New Start." In July 1992, informed that he was needed, he returned to work and placed in charge of the midnight (Tour 1) shift, working 11 hour days. The extended time at work exacerbated his pain and eventually by mid-August 1992 he again had to go out on sick leave.

Under these circumstances, by January 1993 he filed for a disability retirement. It was with this filing that the Agency was clearly put on notice that the Complainant had a disability: the herniated spinal disc and its resultant extreme pain. It was also with the disability filing that the Agency was put on notice that Complainant asked for some reasonable accommodation for his disability. And the request for reasonable accommodation was made in direct response to a question posed by the Agency itself. (Report of Investigation Exhibit #2) Complainant stated as follows:

"[Q] 6. Describe any other restrictions your activities imposed on your medical condition(s) (i.e. disease or injury)

which you believe should be considered in determining your ability to perform in other positions in your agency for which you may otherwise be qualified.

"[A] The same basic restrictions of activities imposed by my medical condition described above make my ability to perform in other positions for which I may be qualified very limited. If I sit at a computer I need to take periodic breaks to lie down and this will be difficult to accommodate. In addition, when pain intensifies, the painkiller medication I take makes it unadvisable to drive a car.

"[Q] 7. What efforts have been made by your agency to change your work area or your job to make it possible for you to perform useful and efficient service in your position or another position?

"[A] Efforts to restrict my standing and walking were made but when the new facility opened my presence was needed during this critical period. As a result I wound up working 10-12-hour days for 12 consecutive days from July 12 thru July 23rd and this made my condition exacerbate. The best accommodation that could be made would be to allow me to perform computer related activities from home via modem. This would allow me to work as long as my condition allowed, take a rest and go back to work, then rest and avoid the daily grind of traveling that is the biggest obstacle to my returning to work. I know this sounds unorthodox, but I have much to contribute and the technology is available to allow for such an arrangement (perhaps with the New York City Satellite Video Facility). Another possible alternative would be to place me as a Station Manager at a station that is within walking distance

or a very short ride from my home (i. e. 11204, 11214, 11219).

The Agency's local officials offered Complainant the position of Distributions Operations Manager (EAS-16). Complainant testified that he could not accept the position since it required extensive standing. It did not appear it that the offer was made in contemplation of the Complainant's known disability and his required accommodation.

In March of 1993 Complainant attempted to return to work to fix the Agency computers in the Brooklyn facility, now in sore need of updating. In this regard, Complainant had been contacted by an outside contractor with respect to the updating. Complainant was needed because of his close knowledge of the postal system computer software program. At that point, Complainant requested of supervisor Greg Incontro that he be allowed to return to work, at least for the short period of three to five days necessary to fix the computer system. Incontro denied the request and told Complainant that since he had filed for disability retirement he could not work. At the hearing Incontro denied having made that statement; however it became perfectly clear that Incontro's testimony was false: On cross examination Incontro was confronted with his own contrary testimony given August 4, 1994 at another hearing (EEOC #160-94-8357X, USPS 1A-113-1693-93) as well as his own affidavit in the file (Aff. B). It was clear that Incontro had told Complainant he would not be allowed to work because he had filed for disability retirement.

Thereafter a position was offered the Complainant. Complainant could not take that position. By letter dated June 14, 1993, Complainant wrote to Agency official

Timothy C. Healy in which he thanked Mr. Healy for the job offer but he then continued: (Report of Investigation Exh. 4):

"...Unfortunately, as you know, I have put in for a disability retirement due to my condition stemming from a car accident in March 1992...[m]y most recent medical update indicates that there is no change in my condition (herniated disc L5 S1). As such I do not feel I am able to perform in such a position (Supervisor, Distribution Operations, Level 16) even if my disability is not granted and that at some point in the future I am required to return to work or receive LWOP, as my leave is almost depleted...

...I would appreciate an offer in a position in the In-Plant Support area if and when one becomes available, just so that I have a job that I can perform in, should my condition improve..."

Complainant received no response from Mr. Healy.

At the end of June 1993 Complainant was directed to a Mail Flow Control position. He testified that here again he could not take the position since he could not physically handle its requirements.

It appears that at no time did the Agency actually undertake an analysis of Complainant's disability or make an attempt to find reasonable accommodation, notwithstanding Complainant's specific requests given in response to Agency queries, supra, that he be allowed to do his work perhaps via the latest computer technologies. It is also uncontroverted that the Complainant's actual work with the Agency was with its computer systems. I note that his requested accommodations – as specified in response to Agency questions, supra – was directly in line with the nature of his work.

The disability retirement request was denied in August of 1993. Complainant asked for reconsideration and it was finally granted in January 1994.

The Rehabilitation Act and its implementing regulations place an affirmative duty upon employers, particularly the federal government, to give full consideration to the hiring and placement of qualified (disabled) employees. 29 C. F. R. 1614.203 at seq.

Pursuant to the Commission's regulations, a Federal agency may not discriminate against qualified individuals with disabilities and shall make reasonable accommodations to the known physical limitations of such qualified employees unless the Agency can demonstrate the accommodation would impose an undue hardship on the operation of this program. 29 C. F. R. SS 1614.101 & 1614.203. In part, the Commission's regulations define an individual with disabilities as one who has a physical impairment which substantially limits one or more of such person's life activities. To be under the ambit of the Statute, the individual must also be "qualified." The Regulations go on to define a "qualified" individual with disabilities as an individual who, with or without accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who meets the experience and/or education requirements of said position. Specifically, to come within coverage of the regulations the Complainant must show that he [a] has a physical impairment (including a physiological disorder affecting the musculosketal system); [b] which substantially limits one or more of such person's major life activities (including the ability to work); [c] has a record of or has been

classified as having an impairment which limits at least one major life activity; or [d] is regarded as having such an impairment.

From the evidence of the record, it is clear that the Complainant was suffering from an impairment (the back injury) that substantially limited his life activities. There is no question but that he was competent to do the work that he had done before the injury. And in direct response to inquiry by the Agency, he sought accommodation for his work as a computer expert by allowance to a "Flexi-Place" situation, whereby he might do his computer work via modem from his home. No citation is necessary to show that work via a modem is not only an accepted modus operandi in public as well as private work, but one presently favored in all work situations that reasonably allow for it.

I find that the Complainant was a person with a disability by the Statute and Regulations. I also find that he is a qualified individual in that, with or without accommodation he could perform the essential functions of the position if accommodated by any of the proposals presented to the Agency, including but not limited to use of a Flexi-Place work via modem or even to a local station near his home.

Once the Complainant establishes that he is a qualified disabled person, the burden shifts to the Agency to show that no reasonable accommodation is available or that such accommodation would impose an undue hardship in its operations. Prewitt v. U.S. Postal Service, 662 F.2d at 301-02 (5th Cir. 1981); 29 C. F. R. S. 1614.203 ©.

What is clear in this entire matter is that the Agency simply did not attempt to present the necessary reasonable

accommodation sought by the Complainant to allow him to continue or resume work, notwithstanding his stated requests. Furthermore, the outright denial of work by supervisor Incontro – clearly revealed a discriminatory animus in violation of the Rehabilitation Act. As noted above, Incontro was a particularly suspect witness for the Agency. I find that he quite purposely disallowed Complainant any work on account of his disability.

Interpretative Guidance issued by the EEOC ("ADA Handbook") presents the following Section I-41:

"Reasonable accommodation means...(ii) Modifications or adjustments to the work environment...that enable a qualified individual with disabilities to perform the essential functions of the position."

The Guidance makes it quite clear the thrust of provisions for Reasonable Accommodations is to keep an otherwise qualified individual in the work force.

Furthermore, in Tavarossi v. USPS EEOC No. 01930804 (December 10, 1993), the Commission stated that

"...we emphasize the continuing nature of the agency's fundamental duty under the Rehabilitation Act and EEOC Regulations. Unless the agency can prove that an accommodation would be an undue hardship, the agency's duty to accommodate is absolute and continuing." [Emphasis furnished.]

The record reveals that ultimately, in January 1994, a disability retirement was granted. However, during the period of time before it was granted the Complainant was not afforded the opportunity of working with reasonable accommodation in accordance with his restrictions nor did

the Agency meet its absolute continuing duty to accommodate.

NOTICE

Pursuant to 29 C. F. R. 1614.109(g) the Administrative Judge's Findings & Conclusions shall be binding on the Agency sixty (60) calendar days after the Agency's receipt of the complaint file and those Findings & Conclusions, unless within that time the Agency rejects or modifies the Findings & Conclusions. If the Agency does not reject or modify the Administrative Judge's Findings & Conclusions within the sixty-day period, the Agency shall notify Complainant that pursuant to 29 C. F. R. 1614.110 those Findings & Conclusions shall be the final decision of the Agency. The Agency shall also notify the Complainant in writing of his/her right to appeal to the Equal Employment Opportunity Commission and attach to the notice a copy of EEOC Form 573 (Notice of Appeal/Petition).

"S/_____"
DAVID E. LICHT
Administrative Judge
U.S. Equal Employment
Opportunity Commission
New York District Office
7 World Trade Center
New York, N.Y. 10048

Federal Equal Opportunity Reporter

Appellant Responsible for Breakdown in Reasonable Accommodation Process

Frank P. Faconti v. Henderson, Postmaster General, U. S. Postal Service

[EEOC OFO] The Commission has found that the appellant was not discriminatorily denied reasonable accommodation because the agency made good faith attempts to accommodate his back condition and was not responsible for the fact that he did not effectively communicate his suggestions for accommodations that would allow him to continue to work. The appellant, who had worked in a supervisory position as a computer expert in the agency's Brooklyn, New York In-Plant Support area, filed a formal EEO complaint alleging that he was discriminated against on the basis of his disability (back injury) when he was denied to return to work while his disability retirement application was pending. After a hearing, an EEOC AJ issued a recommended decision finding that the appellant was subjected to discrimination as alleged. The agency rejected the recommendation and issued a final decision finding no discrimination. The Commission affirmed the agency's decision on appeal. The Commission found that the appellant was an individual with a disability. It further found that he was a "qualified" individual with a disability because he was able to perform the essential functions of his position when his back condition did not prevent him from doing so. In making the determination, the Commission noted that the appellant's representations in his application for disability retirement were not determinative with regard to whether he was a "qualified" individual with a disability. The

Commission went on to acknowledge the appellant's assertion that he would have been able to remain working if the agency had accommodated his condition. However, it found that the agency was engaged in the appropriate interactive process necessary to fashion a reasonable accommodation, but that the process eventually broke down when the appellant incorrectly asserted that his supervisors were aware of the specific accommodations he suggested in his disability retirement application. Because the appellant was responsible for the breakdown in communication, the Commission concluded that the agency could not be held liable for discrimination. *EEOC 01976463: (02/05/99)*; 99 *FEOR 111b*

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Subchapter 60A CSRS
Part 60A1 General Information
Section 60A1.1-1 Overview

A. Introduction

This Chapter covers disability retirement. A disability retirement annuity is a benefit provided to protect an employee who is no longer able to provide useful and efficient service in his or her current grade or pay level because of a medical condition.

Generally, the interests of both the Government and the individual are served if an employee remains gainfully employed as long as he or she can provide useful and efficient service without endangering himself or herself, others, or Government property. Disability retirement should be a last resort and is appropriate only when reasonable efforts to preserve the person's employment have failed.

If attempts to retain the employee in a productive capacity are unsuccessful, and the employee decides to apply for disability retirement, the agency must

assist the employee in filing an application with OPM. (This does not mean that the agency has an obligation to support allowance of the application; indeed, if the agency believes that the criteria for allowance are not met, it should document the basis for that conclusion in the appropriate portion of the application package it submits to OPM.) Even though an employee separated for more than 31 days is responsible for filing the disability retirement application directly with OPM, the agency must fulfill its responsibility by promptly providing the needed documentation in its possession.

B. Topics Covered

This subchapter covers –

- The general statutory requirements an employee must meet to be eligible for a disability retirement annuity;

- The criteria that must be documented to establish eligibility for a disability retirement;

- Who may file the application for disability retirement and when the application must be filed;

- The procedures the employee and agency must follow when submitting an application for disability retirement to OPM;

- The rules that apply to the withdrawal of an application for disability retirement;

- The criteria OPM considers in making a determination to approve or disapprove an application for disability retirement and the reconsideration/appeal procedures to use if the application is disapproved; and

- The requirements an individual must meet to continue receiving a disability retirement annuity.

C. Organization of Subchapter

The CSRS subchapter has nine parts:

Part	Name of Part	Page
60A1	General Information	1
60A2	Disability Criteria	9
60A3	Filing the Application	21
60A4	Submitting the Application to OPM	28
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60A7	Continuation of Disability Annuity	37
60A8	Election Between Disability Retirement and Workers' Compensation Benefits	40
60A9	Advice to Employee	44

NOTE: Subchapter 60B about disability retirement under FERS begins on page 47. **Also, subchapter page numbers are the same page numbers of the OPM document and aren't the same in this excerpt due to 6 1/8 x 9 1/4 format.**

D. Statement of Authority

This subchapter and its contents are based on the laws and regulations cited below.

- United States Code: 5 U.S.C. 8337
- Code of Federal Regulations: 5 CFR Part 831

Section 60A1.1-2 Definitions

A. Useful and Efficient Service

"Useful and efficient service" means (1) either acceptable performance of the critical or essential elements of the position or the ability to perform at that level; and (2) satisfactory conduct and attendance.

B. Service Deficiency

"Service deficiency" or "deficient service" means that the employee's performance, attendance, or conduct is less than fully successful, and, if uncorrected, warrants action to deny a pay increase, reduce the grade or remove the employee from his or her position. (See 5 CFR Parts 432, 531-D or 752.)

C. Commuting Area

"Commuting area," as it is used in this Chapter, has the same meaning as for discontinued service retirement. It means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and

reasonably can be expected to travel back and forth daily in their usual employment.

D. Tenure

"Tenure" means the same type of appointment as currently held by the employee. For most employees, this will mean a career appointment in the competitive service, since this is the type of appointment they currently have. For excepted service employees, it means another excepted service position with the same expectation of continued employment they currently have.

E. Vacant Position

"Vacant position" means a position of the same tenure (for example, career, temporary) in the same commuting area, which is not occupied, and which is full time. If the employee's current position is less than full time, the vacant position must have a work schedule of no less time than that of the current position.

F. Same Grade or Pay Level

"Same grade or pay level" means:

- In regard to a vacant position within the same pay system as the position the employee presently occupies, the same grade and an equivalent amount of basic pay as defined in 5 U.S.C. 8331(3);

- In regard to a vacant position in another pay system, a representative rate (as defined in 5 CFR 532.401) at least equal to the representative rate of the employee's current position

G. Qualified for Reassignment

"Qualified for reassignment" means able to meet the minimum requirements for the grade and series of the vacant position in question.

For this purpose, under 5 U.S.C. 8337(a), an employee of the United States Postal Service is not considered qualified for a reassignment if the reassignment is to a position in a different craft or is inconsistent with the terms of a collective bargaining agreement covering the employee.

H. Disabled/ Disability	"Disabled" or "disability" mean unable or inability to render useful and efficient service because of disease or injury -- • In the employee's current position; or • In a vacant position in the same agency at the same grade or pay level for which the individual is qualified for reassignment.
I. Physician	"Physician" means a licensed Doctor of Medicine or Doctor of Osteopathy, or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under Part 339 of title 5, Code of Federal Regulations (Medical Determinations Related To Employability).
J. Medical Documentation	"Medical documentation" or "documentation of a medical condition" mean a statement, submitted from a physician (or other state licensed medical practitioner

providing service within the scope of his or her license), that provides the following information, or the parts identified by the agency as necessary and relevant:

1. The history of the specific medical condition(s), including references to findings from previous examinations, treatment, and responses to treatment;

2. Clinical findings from the most recent medical evaluation, including any of the following that have been obtained: findings of a physical examination; results of laboratory tests; X-rays; EKG's and other special evaluations or diagnostic procedures; and, in the case of psychiatric disease, the findings of a mental status examination and the results of psychological tests;

3. Assessment of the current clinical status and plans for future treatment;

J. Medical Documentation (Cont.)

4. Diagnosis;

5. An estimate of the expected date of full or partial recovery;

6. An explanation of the effect of the medical condition on life activities both on and off the job;

7. Narrative explanation of the medical basis for any conclusion that the medical condition has not become static or well stabilized;

8. Narrative explanation of the medical basis for any conclusion that indicates the likelihood that the individual is, or is not, expected to experience sudden or subtle incapacitation as a result of the medical condition;

9. Narrative explanation of the medical basis for any conclusion that duty restrictions or accommodations are or are not warranted and, if they are, an explanation of their

J. Medical Documentation (Cont.)

therapeutic or risk avoiding value and the nature of any similar restrictions or accommodations recommended for activities not related to work; and

10. Narrative explanation of the medical basis for any conclusion that indicates the likelihood that the individual is, or is not, expected to suffer injury or harm by carrying out, with or without accommodation, the tasks or duties of a position for which he or she is assigned or qualified.

K. Examination/ Reexamination

"Examination" and "reexamination" mean an evaluation of evidentiary material related to the question of disability. Unless OPM exercises its choice of physician, the cost of providing medical documentation rests with the employee or disability annuitant, who must provide any information necessary to OPM's evaluation.

L. Income From Wages and/or Self-Employment

"Income from wages and/or self-employment" is defined by regulation, but generally means –

1. Money or property received by a disability annuitant as consideration for or in reward of personal services or a work product;

2. Profit from a business (sole proprietorship, partnership, or corporation) wholly or partly owned by the disability annuitant and in which the disability annuitant has an active role in managing; and

3. For a disability annuitant reemployed by the Federal Government, any amount offset or deducted under the provisions of 5 U.S.C. 8344 or 8468

Section 60A2.1-4 Accommodation

A. Policy

Federal policy regarding the employment of handicapped persons advocates that Federal agencies attempt to retain disabled employees by accommodating their disability. Therefore, the agency must exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement.

B. Reasonable Accommodation

"Reasonable accommodation" is any action that the agency would be obligated to take under the Rehabilitation Act of 1973 (29 U.S.C.§§701 et seq). An accommodation is an adjustment made to a job and/or work environment that enables a qualified handicapped person to perform the duties of that position. Reasonable accommodation obligations apply both to the employee's current position and to any

vacant position to which the employee could be reassigned. (See section 60A2.1-5 below for a discussion of reassignment.)

C. Examples of Reasonable Accommodation

Reasonable accommodations may include, but are not limited to --

- Modifying the work site;
- Adjusting the work schedule;
- Restructuring the job;
- Acquiring or modifying equipment or devices;
- Providing interpreters, readers, or personal assistants; and
- Reassigning or retraining the employee. (See FPM Chapter 306.)

D. Job Analysis

If the agency has prepared a job analysis for accommodation purposes, the analysis should be submitted to OPM, together with the application and other supporting documents.

E. Notice to OPM of Successful Accommodation

If the agency is successful in accommodating the employee after the disability retirement application has been forwarded to OPM, the agency **must** immediately notify OPM of the successful accommodation.

Section 60A2.1-5 Reassignment

A. Policy

In addition to accommodation (section 60A2.1-4), Federal policy regarding the employment of handicapped persons dictates that agencies make every effort to retain the services of these employees through reassignment to other available positions.

Thus, when an employee initiates an application for disability retirement, the employing agency must review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.

NOTE: An agency is not obligated to create a position for a disabled employee.

B. When Employee Deemed Qualified for Reassignment

For disability retirement purposes, an employee is deemed "qualified for reassignment" when he or she meets the minimum requirements for the grade and series of the vacant position in question. (See section 60A1.1-2 paragraph G.)

In considering qualifications for another position, the agency may consider requirements for mobility or travel that are precluded by the employee's medical condition.

C. Time Limit on Search for Vacant Position

OPM prescribes no minimum time for which an employee must be given special consideration for placement in a vacant position since a reasonable attempt to place an employee depends on the facts in each individual case.

Nevertheless, consideration for placement should continue at least

until the agency receives OPM's notification that the disability claim has been allowed. Furthermore, placement is limited only by agency authority and can occur after OPM's allowance of the application.

D. When Agency Identifies Vacant Position

1. If the agency identifies an available vacant position for which the employee is minimally qualified, but has questions concerning his or her knowledge, skill, or ability to perform successfully, the agency should first detail the employee to the position.

2. In the event the agency is successful in reassigning the employee (with or without first detailing him or her), the application for disability retirement and supporting documents should be returned to the employee since there is no eligibility for disability retirement

when there is a qualifying vacancy available.

D. When Agency Identifies Vacant Position (Cont.)

3. If, despite the agency's decision that it has successfully accommodated the employee's disability, the employee insists that the application be sent to OPM for a determination, the agency should submit the application and all supporting documents to OPM, together with its opposition to the application stating the accommodation efforts provided, or the reasons the agency believes that no accommodation or reassignment efforts are needed.

E. Employee Refusal to Accept Vacant Position

If the agency locates one or more vacant positions at the same grade or pay level and in the same commuting area for which the employee is qualified for reassignment, but the employee refuses reassignment, the employee's refusal terminates the agency's obligation to identify any other vacant position as an alternative to disability retirement.

The agency should notify OPM of the employee's refusal, provide any evidence the employee submitted in support of his or her refusal, and then proceed with whatever personnel action is appropriate, since OPM will not approve an application for benefits when any employee has refused a reassignment for which he or she is qualified.

F. Agency Decision Not to Place Employee in Vacant Position

1. Under very limited circumstances, the agency may decide not to offer a vacant position to an employee who meets the qualification standards. Appropriate situations include but are not limited to--

- Selection of another employee with a higher priority placement right;

- Nonselection because the medical condition precludes performance in the available vacant position;

- Nonselection because one or more critical elements of the new position

are the same as those the employee performs unsuccessfully in the present position;

- Non selection because a disciplinary removal action has been initiated; or

- An agency decision not to recruit internally or externally to fill the position.

2. If an agency chooses not to reassign the employee, the agency must identify the positions for which the employee is qualified and give the reasons why reassignment was not effected.

G. Competing Applicants for Vacant Position

In the case of competing priorities among employees and disability applicants for the same position (for example, another employee has a high priority placement right), the agency should follow its own internal procedures in making a selection. However, an agency may not decline to place an employee in a vacancy

solely because better qualified candidates are available.

H. Placement in Lower Grade or Pay Level

Where possible, agencies are encouraged to attempt to place an employee in a position at a lower grade or pay level to retain the employee in a productive capacity. Pay retention may be offered at agency discretion when doing so would be of mutual benefit to the agency and employee.

Appropriate circumstances may exist when the employee can be placed in a new career ladder, when the employee can be provided training that would result in repromotion, or when the employee is expected to recover from a disabling condition. (The usual merit competitive procedures described in 5 CFR Part 335, or equivalent procedures for an employee not covered by these procedures, apply.)

An employee may decline an offer of a position at a lower grade or pay

level, a position of lesser tenure, or a position in another agency or commuting area, without affecting his or her eligibility for disability retirement.

I. Acceptance of Position at Lower Grade or Pay Level

The employee must be counseled that voluntary acceptance of a position at a lower grade or pay level terminates consideration for disability retirement. Likewise, placement in a position at a lower grade or pay level under adverse action or equivalent procedures prior to the submission of an application to OPM precludes consideration of the retirement application.

Consequently, the agency should obtain a written statement from the employee to show that he or she was aware of the effect the voluntary acceptance of a position at a lower grade or pay level would have on his or her application for disability retirement.

NOTE: After an application is filed with OPM, involuntary placement in a position at a lower grade or pay level under Parts 351, 431, or 752 of OPM's regulations (or equivalent procedures for an employee not covered by these procedures) does not affect consideration of the application.

UNITED STATES POST OFFICE

DATE: March 11, 1993
OUR REF: NED13:CASKEW
SUBJECT: DOCTOR'S EVALUATION

TO: Frank P. Faconti
6616 Ovington Court
Brooklyn, NY 11204-4264

RE: Frank P. Faconti
SSN: 133-38-8535

Attached is a statement from the Doctor in the Medical Unit in regards to your application for disability retirement.

The Doctor recommended that you be transferred to a station near your home.

Christina Askew
Personnel Services
1050 Forbell Street
Brooklyn, New York 11256

(2)

Supreme Court, U.S.
FILED
APR 27 2004
OFFICE OF THE CLERK

No. 03-1239

IN THE

Supreme Court of the United States

FRANK P. FACONTI,
Petitioner

v.

JOHN E. POTTER,
POSTMASTER GENERAL OF THE UNITED STATES
Respondent

On Petition For A Writ of Certiorari To The
United States Court of Appeals For the Second Circuit

PETITION FOR REHEARING

FRANK P. FACONTI
Pro Se
6618 OVINGTON COURT
BROOKLYN, NY 11204
718-259-7193

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II. The Court should consider and grant this Petition for Rehearing because this Petition puts forth a "substantial ground not previously presented," in the Petition for Writ of Certiorari, in that the use of Judicial Estoppel as a basis for granting summary judgment in the various Circuit Courts of Appeal is inconsistent and contrary to principles established by this Court. 6

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Reasons For Granting The Petition For Rehearing

I. The Court should consider and grant this Petition for Rehearing because this Petition constitutes an "intervening circumstance of ...substantial effect" to wit, the purposes of the Rehabilitation Act of 1973 are being ignored by federal agencies in the processing of CSRS/FERS disability retirement applications. and puts forth a "substantial ground not previously presented" in the Petition for Certiorari, to wit, (2) the use of Judicial Estoppel as a basis for granting summary judgment in various Circuit Courts of Appeal is inconsistent and at times contrary to the principles established by this Court.

One permissible ground for a petition for rehearing of an order denying a petition for writ of certiorari is an "intervening circumstance of substantial effect." Supreme Ct. Rule 44(2). As will be set forth below, the 1999 decision of the Supreme Court in ***Cleveland v. Policy Mgmt. Sys., Inc.*** and the purposes of the Rehabilitation Act of 1973 constitute an "intervening circumstance of...substantial effect."

As stated in the Rehabilitation Act of 1973, "The purposes of the Act" in item (2) are, "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living."

In these cases, Magistrate Robert M. Levy stated in his decision, "...a person who successfully applies for a CSRS (*Civil Service Retirement System*) disability retirement

annuity cannot, by definition, be a 'qualified individual with a disability' under the Rehabilitation Act." This contention is contrary to the stated purpose (2) of the Rehabilitation Act for the federal government to play a "leadership role in employment of individuals with disabilities," as it allows federal agencies to circumvent their requirements to accommodate/reassign applicants for both CSRS and FERS disability retirement by rubber-stamping such disability retirement applications. Then, once the employee is granted disability retirement, the agency can avoid the responsibility for failing to accommodate/reassign a disabled employee because the employee can no longer be considered 'a qualified individual with a disability' within the meaning of the Rehabilitation Act of 1973. This circular reasoning will enable federal agencies a loophole whereby they can simply refuse to make any effort to accommodate any applicant for CSRS/FERS disability retirement and, once the Office of Personnel Management (OPM) grants a disability retirement to an employee who otherwise could have been, and by law should have been accommodated, that employee will not only have been discriminated against by the federal agency's failure to accommodate the disability, but the agency will ostensibly be off the hook by arguing that once OPM granted disability retirement, the employee can no longer be considered a qualified individual with a disability and that employee will have no legal recourse. Instead of the federal government playing a leadership role in employing the disabled, such a situation will allow federal agencies to purge their roles of disabled employees, rather than accommodate disabled employees, as required by the Rehabilitation Act.

This is the exact situation in my case and, in some ways, the error is similar to that which this Court corrected in ***Cleveland v. Policy Mgmt. Sys., Inc.***, 526 U.S. 795 (1999), where the District Court erroneously held that, "Cleveland, by applying for and receiving SSDI benefits, had conceded that she was totally disabled. And that fact, the court concluded, now estopped Cleveland from proving an essential element of her ADA claim, namely that she could 'perform the essential functions' of her job, at least with 'reasonable accommodation.'" The difference in the cases is that the District Court made the same erroneous conclusion, only in my cases it's about CSRS disability retirement being granted by OPM where a federal agency had an obligation under the law, both as a leader in employment of the disabled and under the Federal Personnel Manual (FPM) (reprinted in the **Petition for Writ of Certiorari Appendix I pages 107a to 131a** as an excerpt from **Appellant Brief** in Case No. 02-6320 - **Appendix Exh. E**) to "...**exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement**" and to "...**review all vacant positions under its jurisdiction, at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.**" If anything, my cases cry out for justice louder than the ***Cleveland*** case for the above-cited reasons.

On the back of the actual form the federal agency must fill out to document their efforts, the **Agency Certification of Reassignment and Accommodation Efforts** form

(**Appellant Brief** in Case No. 02-6318, **Appendix Exhibit E in the Record on Appeal**), there is another form with instructions for the agency, the **Guidelines for Coordinator for Employment of the Handicapped** form (**Appellant Brief** in Case No. 02-6318, **Appendix Exh. D in the Record on Appeal**). In part, the instructions state –

> The **law** requires that where an employee who otherwise would be eligible for disability retirement initiates an application, the agency must review all vacant positions under its jurisdiction at the same grade or pay level and tenure in the commuting area, to determine if the employee meets the minimum qualification standards for any vacant position.

These instructions are the **law** for **all** federal agencies and the wording is clear – "where an employee who otherwise would be eligible for disability retirement," can easily be construed to mean that the employee is capable of being granted a disability retirement, yet federal agencies must still try to accommodate/reassign the disabled employee. The statement, "the agency **must** review all vacant positions under its jurisdiction," **cannot** be construed to mean to do **nothing**! It is indisputable evidence in these cases that the agency, as shown by the **Agency Certification** form the agency itself filled out (or rather failed to fill out with any documentation of accommodation/reassignment efforts in response to the questions, as detailed in my Petition for Writ of Certiorari) that the agency made **no** effort to accommodate/reassign me.

It has been legally decided by the Magistrate that I never requested an accommodation through the proper chain of command, but the Courts and even the EEOC are wrong in this matter, as all federal agencies are supposed to have in place a **Coordinator for the Employment of the Handicapped** whose specific job it is to perform the tasks detailed above when an employee files an application for CSRS/FERS disability retirement. An employee's supervisor has no knowledge of the accommodation/reassignment process, or these instructions, which are specifically for this Coordinator for Employment of the Handicapped. I would venture to predict that if the Court were to check to see if federal agencies have a person with such a title or performing the specific function of this position, there would be basically non-compliance with these legal requirements, as federal agencies do not take the Rehabilitation Act's stated purpose seriously. As proof of this assertion, I evidence the Magistrate's own statement regarding these very instructions from his decision at footnote 17, "As defendant points out, this obligation on the part of federal agencies to determine whether or not there are reasonable accommodations for an employee who has filed for disability retirement appears to exist in substantial part for the benefit of the government, not the employee." This outrageous statement by a Federal Magistrate perpetuates the climate that ignores the Rehabilitation Act's stated purpose under (1) "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through - (2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities." The FPM,

which was the OPM publication provided to all federal agencies to assist them in processing both CSRS and FERS disability retirement applications, states in **Section 60A2.1-4 Accommodation - B. Reasonable Accommodation,** "Reasonable Accommodation is any action that the agency would be obligated to take under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.)." Tying these Reasonable Accommodation obligations under the FPM to "any action that the agency would be obligated to take under the Rehabilitation Act" clearly establishes the Magistrate is wrong. The existence of this obligation to accommodate the disabled employee who applies for CSRS/FERS disability retirement is not substantially for the benefit of the government, **it is for the disabled!** For the Supreme Court to ignore this case and allow a federal agency to discriminate against the disabled and get away with it is also wrong. A loophole for federal agencies to not only avoid playing a leadership role in the employment of the handicapped, but for purging the federal workforce of disabled employees must be seen as intervening circumstances of a substantial effect.

II. **The Court should consider and grant this Petition for Rehearing because this Petition puts forth a "substantial ground not previously presented" in the Petition for Writ of Certiorari, to wit, the use of Judicial Estoppel as a basis for granting summary judgment in various Circuit Courts of Appeal is inconsistent and at times contrary to the principles established by this Court.**

One permissible ground for a petition for rehearing of an order denying a petition for writ of certiorari is a "substantial ground not previously presented." Supreme Ct. Rule 44(2).

As will be fully set forth below, a substantial ground not previously presented in the Petition for Writ of Certiorari is presented herein, and provides further and compelling ground for this Court to grant the writ of certiorari in these cases.

Judicial Estoppel is different things to many different judges and magistrates throughout this great land of ours. It is, unfortunately, a tool which prevents a plaintiff from ever getting a jury of one's peers to hear the evidence and decide the issue(s) in a case. It allows judges and magistrates to decide what cases go to trial. If a plaintiff/appellant's case resides in a circuit where judicial estoppel is being granted only within very limited situations, (i.e. as in the D.C. Circuit which ruled in a 1980 case, ***Konstantinidis v. Chen***, 200 U.S. App. D.C. 69, 626 F.2d 933, 936-38, "The party seeking to invoke the estoppel, however, must have been an adverse party in the prior proceeding, must have acted in reliance upon his opponent's prior position, and must now face injury if a court were to permit his opponent to change positions."), and another case goes before a different circuit (i.e. my cases before the Second Circuit where judicial estoppel was defined as, "The requirements for judicial estoppel are as follows (*quoting* Bates, 997 F.2d 1037): 'first, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner.'"), we have two different sets of criteria for granting judicial estoppel and there is no equal justice. The Supreme Court needs to clearly define this substantial issue so that there is a consistency in the application of judicial estoppel.

Recent Supreme Court rulings, such as the ***Cleveland*** case and ***New Hampshire v. Maine*** 121 S.Ct. 1808 U.S., 2001, still leave too much power to grant summary judgment on the basis of judicial estoppel in one person's control at the District Court level. For example, in my cases, Magistrate Levy stated, "Faconti is judicially estopped – based on his previous statements to the OPM and SSA – from claiming that he was capable of performing the essential functions of the position for which he applied." Yet, in ***Cleveland***, the Supreme Court ruled that, "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." As noted in my Petition for Writ of Certiorari, the relevant employment decision was in March, 1993 when in both cases I claimed that the USPS discriminated against me by failing to select me for a position and awarding it to a non-disabled employee and by failing to accommodate my disability when the agency processed my CSRS disability retirement application. My application for SSA benefits that the Magistrate refers to was eight months **later**, and that request was denied, yet Magistrate Levy then goes on to detail my statement from a request for reconsideration which was written in 1994, one year **after** the relevant employment decision. I had been on Leave Without Pay, I had no job, no income and my CSRS disability retirement wasn't approved until January, 1994, so had the agency accommodated my disability in March, 1993, none of these statements would have been written and my condition, in all likelihood, would not have deteriorated. Even my letter to OPM requesting reconsideration, after my

disability was denied, was written six months **after** the relevant employment decision and it was written **because I had not been accommodated and my condition worsened because of the stress of having no job or income!**

My position in these current cases is based on the statement I made back in January, 1993 in my applicant's statement from my CSRS disability retirement application, (**Appellant Brief** in Case No. 02-6320 - **Appendix Exh. J**) in which I expressed a desire to be assigned to a station near my home, "Another possible alternative would be to place me as a Station Manager at a station that is within walking distance or a very short ride from my home (i. e. 11204, 11214, 11219)." This statement was made in January, 1993, **BEFORE** the statements the Magistrate used to grant summary judgment on the basis of judicial estoppel. Even allowing for Magistrate Levy's Second Circuit definition of judicial estoppel, it cannot be applied to my cases as it is the same factual statement as I stated in the first instance during the relevant employment decision. Everything that the defendant and Magistrate have claimed I stated as being a cause for judicial estoppel was **not** said in a **prior** proceeding, but rather **after** the relevant employment decision (from six months to a year), was directly the result of the agency's failure to accommodate my disability and related to a change in my physical condition brought on by the stress of my circumstances described above. Even in the EEO case and subsequent civil case filed in 2001, the relevant employment decision was in March, 1993, **prior** to any of the statements made which the Magistrate used to grant summary judgment on the basis of judicial estoppel. I was in no way trying to play 'fast and loose' with the courts.

Clearly, judicial estoppel was not appropriate in my cases and should never have been granted. It is on this basis that the Supreme Court needs to act and clarify that the use of judicial estoppel is not appropriate when the statements in question are made **after** the relevant employment event.

The ***New Hampshire v. Maine*** case references the same 1980 ***Konstantinidis v. Chen*** case cited above, which apparently is still considered good law, and which decision states in part, "The party seeking to invoke the estoppel, however, must have been an adverse party in the prior proceeding." Even the ***NH v. Maine*** case has the same set of circumstances, with both parties being involved in a previous case from 1970 and NH changing its position from that case, but in my case, the USPS was not a party in my SSA proceedings, nor were they a part of my request for reconsideration to OPM (all of which events happened **after** the relevant employment decision **and** my stating I desired to be accommodated/reassigned). Thus, these factors surrounding the Magistrate's granting of summary judgment on the basis of judicial estoppel create a question as to the selective, inconsistent and, in my case, inappropriate application of the doctrine of judicial estoppel, and most certainly also qualify as a substantial ground not previously presented.

CONCLUSION

The Petition for rehearing should be granted.

RULE 44.2
CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to substantial grounds not previously presented, and that it is presented in good faith and not for delay.